EDITOR'S NOTE

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No. 87-730

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

UNITED STATES OF AMERICA, Petitioner

v.

CHRISTINE MEYER, ET AL., Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

RESPONDENT MARY S. DAILY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a rebuttable presumption of prosecutorial vindictiveness may be applied in the pretrial context where no plea negotiations transpire prior to filing the enhanced charge and where circumstances demonstrate both a realistic likelihood of vindictiveness and actual vindictiveness.

2. Whether a district court has power to dismiss a case when it makes a finding of actual or presumed vindictiveness and no other remedy is available to meaningfully deter prosecutorial misconduct.

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Respondent Mary S. Daily, by counsel, respectfully requests that this Court deny the petition for a writ of certiorari, filed by the government, seeking review of the court of appeals' decision in this case. That opinion is reported at 810 F.2d 1242 (D.C. Cir. 1987) (App. to Pet. for Cert. 1a).

COUNTERSTATEMENT OF THE CASE

Respondent Mary S. Daily was among 195 demonstrators arrested on the White House Sidewalk on April 22, 1985, as part of a "Peace, Jobs and Justice" rally intended to protest policies of the Reagan Administration. Counsel herein was appointed to represent Ms. Daily in the district court pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A (1981).

The factual and procedural details of the case are set forth in the Briefs in Opposition filed by respondent's co-counsel, as well as in the opinion of the court of appeals (App. to Cert. Pet. 2a-4a), and will not be rehearsed here. Rather, counsel will note key aspects of the record omitted in the government's

"Statement" and will highlight various representations made by the government which tend to mischaracterize the record below.

The State of the Record

As a preliminary matter, it is useful to note the state of the record respecting prosecutorial vindictiveness. At the September 11 hearing on defendant's motion to dismiss, various representations -- basically in the form of oral proffers -- were made by counsel for the government, counsel for defendants and several pro se defendants respecting various matters. See Transcript of Proceedings of Sept. 11, 1985, United States v. Fitzgibon, et al., Nos. 85-329, 85-330, 85-331 (D.D.C. Sept. 11, 1985) (hereinafter 9/11/85 Tr.). [1] These representations tended to indicate a factual conflict regarding, e.g., whether the prosecutor informed defendants prior to September 11, 1985, that they still could exercise the forfeiture of collateral option, (compare 9/11/85 Tr. 17, 21, 25, 33-34, 37, 41, 42 with 9/11/85 Tr. 21, 33); whether, at a meeting on September 3, 1985, between the prosecutor, Mr. Ellenbogen and Ms. Jo Ellen Childers, a pro se defendant, the prosecutor threatened to seek substantial jail time for any defendant who was not willing to stipulate to the facts underlying the arrests (compare 9/11/85 Tr. 17-18, 43-44 with 9/11/85 Tr. 21); and whether and when any plea negotiations took place prior to the prosecutor's filing of the increased charges on May 29, 1985 (compare 9/11/85 Tr. 17, 24-25, 37, 40, 42, 44-46 with 9/11/85 Tr. 33).

Although both counsel for respondents and several pro se respondents indicated a willingness to present evidence to

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1 Due to the importance of an accurate understanding of the record in this case, counsel has attached a copy of the entire transcript of the hearing in the district court on September 11, 1985, as an appendix to respondent Daily's Brief in Opposition. Since the transcript, paginated 1-50, is similarly numbered in the appendix from 1a-50a, transcript citations in the brief are not referenced to the appendix.

support their claims, the district court asked the parties to make oral proffers, after which the court would determine whether it was necessary to put on witnesses. E.g., 9/11/85 Tr. 14, 38-39. Following the oral proffers of pro se defendants Judith Hand, Judith Hearn and Mindy Washington, the district court inquired of the prosecutor:

> THE COURT: Is this factually accurate? Do you want me to put people on the stand and take testimony under oath or are these representations made accurate?
>
> MR. McDANIEL: I am satisfied with the representations, Your Honor.
>
> 9/11/85 Tr. 46-47.

The government thus accepted the accuracy of the proffers of defendants and defense counsel regarding, inter alia: the non-existence of any plea bargaining prior to filing of the two-count information on May 29, 1985, (see 9/11/85 Tr. 17, 24-25, 33, 41, 42, 44-46); the absence of any notice to defendants that failure to forfeit collateral by May 29, 1985, would result in the filing of an additional count; and that, prior to the September 11 hearing, defendants had not been informed by the government that forfeiture of collateral was still available as an option (see 9/11/85 Tr. 41); and that after institution of the added charge, the prosecutor had threatened pro se defendant Childers that he would seek substantial jail time against those defendants who would not stipulate to the facts of the government's case (see 9/11/85 Tr. 17-18, 43-44).

Material Omissions or Misleading Assertions of Fact

The government's "Statement" also omits several key facts in its recitation of the facts and proceedings below. Awareness of these omitted facts is crucial to a proper understanding of the record and questions presented in this case.

First, the government fails to acknowledge that, prior to filing the first of the two-count informations against respondents on May 29, 1985, the prosecutor had been informed on

May 15, 1985, by Mr. Ellenbogen, counsel for several of the defendants, that many of the defendants intended to proceed to trial and raise first amendment and other defenses. 9/11/85 Tr. at 16, 37.

Second, during the period between the arrest on April 22, 1985, and the filing of the first tier of two-count informations, no plea bargaining had taken place. 9/11/85 Tr. 33, 42. The sole government-defendant communication during this period was the May 15, 1985, meeting involving the magistrate's office, the Assistant U.S. Attorney and Mr. Ellenbogen, which was precipitated by the failed attempt to arraign the defendants. 9/11/85 Tr. 15. No plea negotiations occurred at this meeting. 9/11/85 Tr. 33, 37. Nor did the prosecutor discuss the forfeiture of collateral option. 9/11/85 Tr. 33.

The government does not indicate that there were three separate arraignment dates set: May 29, June 21 and June 28, 1985. No plea bargaining occurred at all until the June 21 arraignment, where the government extended an offer available only for that day. 9/11/85 Tr. 33, 42. A similar offer was extended at the third arraignment on June 28, 1985. The government did not indicate at any of the arraignments that the forfeiture of collateral option remained open. 9/11/85 Tr. 42. In fact, respondent Childers indicated that the defendants' understanding was that "once I entered a not guilty plea, if I chose to change that plea to guilty or nolo, that my sentence would be at the discretion of the court and not that I could pay $50 and be done with it." 9/11/85 Tr. 42. The record indicates that September 11 was the first time that the prosecutor indicated to respondents that the forfeiture of collateral option remained open up to the moment of trial. 9/11/85 Tr. 33.

Third, the government does not reveal that during a pretrial conference on September 3, 1985, the prosecutor made a statement

to respondent Childers in which the prosecutor "did indeed threaten myself and the other pro se defendants in the case if we would not stipulate to the facts in the case . . . " 9/11/85 Tr. 43. See also 9/11/85 Tr. 17-18 (proffer of Mr. Ellenbogen).

Fourth, the government in several instances represents that the charge was increased only "after a representative of the United States Attorney's office first examined the case, which occurred only after respondents had been arrested on the initial misdemeanor charge and had decided to stand trial." Pet. for Cert. at 4. Yet the record does not indicate any precise point in time when any particular member of the U.S. Attorney's office first became involved in events regarding respondents' arrest. [2] Nor is there evidence that any actual reevaluation of the societal interests in the case prompted the prosecutor to add a charge. [3]

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Had the government proffered evidence that a prosecutor normally is uninvolved in the determination of the initial charge in petty offenses arising from a large demonstration, respondents would have proffered evidence that, in the experience of several defense attorneys with substantial experience representing demonstrators in the District of Columbia [including counsel herein, see e.g., United States v. Grace, 461 U.S. 171 (1983)], in most mass demonstration cases, a member of the U.S. Attorney's office is involved in the pre-charging decision process.

Arrest reports provided to defense counsel prior to trial affirmatively indicate that solicitors from the Department of the Interior (who provide advise to the United States Park Police and the National Park Service, which has jurisdiction over the White Hose sidewalk) were present at the demonstration. See App. 51a-53a.

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The only proffered explanation for the prosecutor's motive in increasing the charge was stated hypothetically. After conceding that new additional information had prompted his action, the prosecutor argued that "[t]he recognition of which legal theory the government wished to proceed on was a different matter. That is something that required a certain amount of contemplation and analysis by members of the United States Attorney's Office and that was motivated, I would suggest, solely by a balancing of the societal interests in controlling unruly demonstrations and the relative gravity of this particular offense given its effect upon the community." 9/11/85 Tr. 21 (emphasis added).

Fifth, on July 30, 1985, Mr. Ellenbogen filed pre-trial motions, including a motion for trial by jury (based on the potential aggregated sentence resulting from the added charge) and a motion to dismiss on grounds of prosecutorial vindictiveness. On September 6, 1985, the district court granted the jury trial motion and set the other issues for argument prior to trial, scheduled to commence on September 11, 1985.

With respect to the district court's ruling, the government fails to indicate that the district court found that no plea bargaining had occurred prior to the time the government filed the second charge on May 29. 9/11/85 Tr. 33. Further, the district court found that no new information had come to the prosecutor's attention since the arrests in April. 9/11/85 Tr. 20-21; see Pet. for Cert. at 4 n. 3. The government does note the district court's finding that respondents never received notice that failure to forfeit collateral would result in an additional charge, id. at 5, but then omits mentioning that the district court, based on the facts presented, made an express finding that "in the exercise of your right to have a jury trial, the government upped the ante . . ." 9/11/85 Tr. 50. The district court found that, "[i]n the sequence of events, it is obvious that the only reason that the two counts came out as they did was that they had elected to go to trial . . ." 9/11/85 Tr. 27.

Finally, in discussing the decision of the court of appeals, the government does not recognize that the foundation of the court's ruling was its view that, while a presumption of vindictiveness ordinarily does not arise in a pretrial setting, where the evidence rises to the level of posing a realistic likelihood of vindictiveness, a rebuttable presumption of vindictiveness may lie. See App. to Cert. Pet. at 7a.

ARGUMENT

The court of appeals disposition of this case is consistent both with this Court's precedent and with decisions from other courts of appeals applying the doctrine of prosecutorial vindictiveness in the pretrial setting. The circuit court's conclusion that, in the unique circumstances of this case, respondents demonstrated a sufficiently realistic likelihood of vindictiveness to justify a presumption of prosecutorial vindictiveness, does not conflict with this Court's decision in United States v. Goodwin, 457 U.S. 368 (1982). Even if the court of appeals erred in concluding that a presumption of vindictiveness was merited in the case, the finding of actual vindictiveness by the district court provides an alternative ground for affirming the judgment below which would avoid the necessity of deciding the first question presented in the government's petition for certiorari. Further, the circuit courts of appeals are not in conflict on the question whether an "untainted" charge can be dismissed as a remedy to a finding of vindictiveness. The consensus of the courts is that the appropriate remedy is a matter for the sound discretion of the trial court, subject to review for abuse of discretion.

I. THE DECISION BELOW DOES NOT DEPART FROM THE COURT'S PROSECUTORIAL VINDICTIVENESS JURISPRUDENCE

A. Goodwin Does Not Preclude Applying a Rebuttable Presumption of Prosecutorial Vindictiveness at the Pretrial Stage Where Objective Evidence Indicates A Realistic Likelihood of Vindictiveness

The government argues that certiorari should be granted because the court of appeals fundamentally misread Goodwin, supra, and misapplied the Court's vindictive prosecution jurisprudence. Upon analysis, however, it is the government who argues for a major departure from both precedent and reason: asserting that Goodwin precludes a pretrial presumption of

vindictiveness under any circumstances; and, that, given a finding of vindictiveness, a district court is without power to dismiss the initial charge, regardless of the circumstances.

As the court of appeals recognized, Goodwin did not establish a per se rule rejecting the application of a pretrial presumption of vindictiveness in every case. See App. to Cert. Pet. 6a-7a. Rather, Goodwin held that a presumption of vindictiveness was not appropriate given the record in that case where, subsequent to the break down of plea negotiations and defendant's election for a jury trial -- and, in the absence of any evidence of actual vindictiveness -- the government filed more serious charges. 457 U.S. at 382-84. As will be further demonstrated below, Goodwin differs substantially from the instant case where no plea negotiations occurred prior to the filing of the added charge and where the indicia of prosecutorial vindictiveness prompted a finding of actual vindictiveness by the district court. See 9/11/85 Tr. 50.

The Court in Goodwin did indicate that "[t]here is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting;" 457 U.S. at 381 (emphasis added). The Court noted, for example, that, while preparing a case for trial, a prosecutor might uncover additional information or come to realize the case has a broader societal significance. Id.

Since Goodwin did not proffer any evidence of actual vindictiveness, the Court noted that it could find vindictiveness "only if a presumption of vindictiveness -- applicable in all cases -- is warranted." Id. The government views the Court's refusal to apply an "inflexible" presumption "in all cases" arising in the pretrial context as equivalent to a holding that courts must apply an "inflexible" presumption against vindictiveness "in all cases" in the pretrial setting. The

government's interpretation is both strained and fundamentally at odds with the concerns which undergrid the doctrine of prosecutorial vindictiveness.

Regardless of the particular procedural context of a criminal prosecution, the Court's central inquiry in determining whether or not to apply a presumption of vindictiveness consistently has focused upon whether circumstances exhibit a realistic likelihood of vindictiveness. The Goodwin Court reaffirmed the statement in Blackledge v. Perry, 417 U.S. 21 (1978), that "[t]he lesson that emerges from [North Carolina v.] Pearce [395 U.S. 711 (1969)], Colton [v. Kentucky, 407 U.S. 104 (1972)], and Chaffin [v. Stynchombe, 412 U.S. 17 (1973)] is that the Due Process Clause is not offended by all possibilities of increased punishment . . ., but only by those that pose a realistic likelihood of 'vindictiveness.'" 417 U.S. at 27.

The court of appeals did not depart from this approach. Rather, it reasoned that a defendant may demonstrate prosecutorial vindictiveness either by a showing of "actual vindictiveness," which the Goodwin Court expressly recognized, 457 U.S. at 380-81, 384 & n.19, or where circumstances indicate a realistic likelihood of vindictiveness. See App. to Cert. Pet. 5a-6a. The court observed that, "when the facts indicate a 'realistic likelihood of 'vindictiveness[,]' a presumption will arise obliging the government to come forward with objective evidence justifying the prosecutorial action." See App. to Cert. Pet. 6a, citing Blackledge v. Perry, 417 U.S. 21, 27-29, 29 n.7 (1974). The panel below continued:

> If the government produces such evidence, the defendant's only hope is to prove that the presumption is pretextual and that actual vindictiveness has occurred. But if the government fails to present such evidence, the presumption stands and the court must find that the prosecutor acted vindictively.
>
> App. to Cert. Pet. 6a.

Other courts of appeals also have recognized that a presumption of vindictiveness will lie in the pretrial setting where sufficient facts are presented to show a realistic likelihood of vindictiveness. See United States v. Krezdorn, 718 F.2d 1360, 1364-65 (5th Cir. 1983), cert. denied, 465 U.S. 1066 (1984); United States v. Gallegos-Curiel, 681 F.2d 1164, 1167-69 (9th Cir. 1982).

The government also asserts that recent cases subsequent to Goodwin counsel against applying a presumption of vindictiveness in the pretrial context, citing Thigpen v. Roberts, 468 U.S. 27, 30 n.4 (1984) and Texas v. McCullough, 106 S.Ct. 976 (1986). Actually, these cases undermine the government's argument.

The cited statement in Thigpen is merely a cryptic reference to the general thrust of Goodwin and notes that Goodwin distinguished Blackledge both in the timing of the enhanced charge and in the increased burden to the State of retrying the case a second time. 468 U.S. at 30 n.4. As will be seen in section I (B), infra, the burden of prosecuting the instant cases was considerably greater than the ordinary burden involved in a typical criminal case.

In McCullough, the Court reaffirmed that the question whether a presumption of vindictiveness arises in any setting depends upon whether there is a "realistic motive for vindictive[ness]." 106 S.Ct. at 980. Where the trial judge granted McCullough's motion for a new trial based on prosecutorial misconduct and McCullough, upon retrial, requested that the same judge resentence him, the Court found the circumstances insufficient to justify a presumption of vindictiveness. Id. at 979. Even through McCullough arose in a post-conviction setting, where a presumption generally applies, the Court found that "[t]he facts of this case provide no basis for a presumption of vindictiveness." Id.

A proper reading of the cases teaches that, whatever the context, a presumption of vindictiveness will lie only if a realistic likelihood of vindictiveness appears on the facts of the case. The difference between the pretrial and post-trial setting is that, in the former situation, a presumption generally will not lie while, in the latter context, a presumption generally will be recognized. Admittedly, the concerns articulated in Goodwin make it more difficult to show a realistic likelihood of vindictiveness in a pretrial setting, but the Court did not forever foreclose the possibility that, in an appropriate case, a presumption of vindictiveness will lie.

B. The Court of Appeals Correctly Determined That Respondents' Proffered Evidence Established a Realistic Likelihood of Vindictiveness

The government argues that the case at bar is controlled by the holding and rationale of Goodwin. This argument hinges on the government's contention that the added charge merely arose from a "form of plea bargaining codified by rule of court." Pet. for Cert. at 9. In the government's view, the initial option of forfeiture of collateral, indicated on the violation notice, was the functional equivalent of the "give and take" of plea bargaining; therefore, the different treatment accorded defendants who forfeited collateral, as compared to those who elected to exercise their right to trial, was "an inevitable (and permissible) result of plea bargaining and raises no due process issue." Id.

The government's argument, while deserving high marks for creativity, is not persuasive. Rather, it represents the government's best effort to bring this case within the contours of Goodwin, which arose in the plea bargaining context. In light of the district court's finding that no plea bargaining transpired in this case prior to the increase in charges, 9/11/85 Tr. 33, neither Goodwin nor Bordenkircher v. Hayes, 434 U.S. 357

(1978), precludes application of a pretrial presumption of vindictiveness in the unique circumstances of this case.

The simple fact is that the increase in charges did not arise following any plea negotiation. 9/11/85 Tr. 17, 24-25, 33, 37, 40, 42, 44-46. The first time a plea agreement was offered was at the second arraignment, on June 21, 1985. 9/11/85 Tr. 33 (Ellenbogen), 42 (Hand). Nor had any notice been provided to respondents that failure to forfeit collateral prior to arraignment would result in an increase in charges. Unlike the defendant in Bordenkircher, prior to filing the increase in charges, there had been neither "give and take" between respondents and the prosecutor nor any communication respecting the continued availability of the forfeiture of collateral option (or the consequences of failing to exercise the forfeiture option). Indeed, respondents' understanding was that forfeiture of collateral only remained open prior to entry of a not guilty plea at arraignment. See 9/11/85 Tr. 42 (Childers). In any event, once respondents had exercised their election for trial in the district court, the forfeiture of collateral option arguably expired by operation of law. [4]

In many ways, Goodwin is representative of many criminal cases. The offense charged involved common criminal behavior and did not arise from arguably constitutionally protected conduct; some plea negotiations transpired; and, most importantly, the government actually reevaluated the charges based both on

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[4] The Local Rule governing forfeiture of collateral, by its terms, is limited to cases currently before the magistrate. Local Rule 505(d) provides:

> In accordance with Rule 4(a) of the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates, the magistrate may in suitable types of misdemeanor cases accept payment of a fixed sum in lieu of appearance. . . .
>
> Local Rules of the United States District Court for the District of Columbia 505(d) (1987) (emphasis added).

additional information (including Goodwin's failure to appear on the charges for over three years) and a balancing of the societal interest in prosecution. See 457 U.S. at 371 n.2. Given the underlying conduct at issue (which involved assault on a police officer and a high speed chase in an effort to elude arrest), combined with Goodwin's prior record of violent criminal behavior, the government's reevaluation of the appropriate charges was both credible and documented. [5] Further, preparation of the case for trial was not so burdensome as to justify a presumption of vindictiveness. Id. at 381. Moreover, the first prosecutor assigned to Goodwin's case was a special assistant who did not have authority to prosecute felonies. The only indicia of vindictiveness in Goodwin was the sequence of events: following failed plea negotiations and defendant's exercise of his right to a jury trial, the government filed enhanced charges. Unlike Bordenkircher, there had been no express threat that failure to plead guilty would result in a greater charge.

The Goodwin Court's discussion of Bordenkircher indicates that a prosecutor's decision to increase charges after an initial expectation that a defendant will plead guilty evaporates is not "punitive" within the meaning of "vindictiveness," 457 U.S. at 380 & nn. 11, 12, and does not, therefore, violate due process principles. Thus, "[a] charging decision does not levy an improper 'penalty' unless it results solely from the defendant's exercise of a protected legal right, rather than the prosecutor's normal assessment of the societal interest in the prosecution." 457 U.S. at 380 n.11.

Significantly, the district court in the case at bar expressly found that, "[i]n the sequence of events, it is obvious

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5 The prosecutor filed an affidavit detailing the government's rationale for filing enhanced charges. 457 U.S. at 371 n. 2.

that the only reason that the two counts came out as they did was that [respondents] had elected to go to trial . . ." 9/11/85 Tr. 27. As noted above, this is the precise evil that the doctrine of prosecutorial vindictiveness was designed to prevent. In light of the many facts distinguishing this case from Goodwin, both the district court and the court of appeals decisions are consistent with the Court's precedent.

As previously noted, the most obvious distinction is that in Goodwin, plea negotiations had occurred and failed prior to the increase in charges. Whether or not Goodwin was provided notice that his failure to plead guilty would result in enhanced charges, see 457 U.S. at 385 (Blackmun, J., concurring in the judgment); since Goodwin himself had initiated the plea discussion, id. at 371, the first prosecutor assigned to the case had a legitimate initial expectation that Goodwin would plead guilty in magistrate's court.

Here, however, nearly 200 people were arrested while demonstrating in front of the White House in protest of various policies of the Reagan administration that impacted on issues of jobs, peace and justice. In addition to the numerous United States Park Police officers on the scene, it also appears that attorneys from the Solicitor's Office of the Department of the Interior also were present and actively supervising and directing the U.S. Park Police. [6] As the similarity among various arrest

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[6] The "Criminal Incident" reports of the U.S. Park Police, provided to defense counsel prior to trial, uniformly indicate that "I heard U.S. Park Police Lt. M. Barrett, under the direction of Mr. R. Robbins - Solicitor/National Park Service, advise the defendant and the group that their permit was revoked and they would have to move or would be arrested." Criminal Incident Record regarding Lisa Tarver (Apr. 22, 1985), App. 51a. Two other sample reports are included in the appendix, each of which are substantially identical to the above. See Criminal Incident Record regarding Julie Lynn Sinai, App. 52a; Criminal Incident Record regarding Richard David Spener, App. 53a. Mr. Robbins, the DOI solicitor referred to, is often indicated as one of the authors of recent federal regulations governing demonstrative activities on the White House sidewalk and in

and incident reports indicates, from the outset, the law enforcement response to the demonstration was coordinated by government attorneys. See App. 51a-56a.

No additional information concerning either the respondents' conduct at the demonstration or any particular respondent came to the attention of the government prior to its increase in charges. 9/11/85 Tr. 21. Nor was there any evidence that particular members of the prosecutor's office in fact reevaluated the case on the basis of the "societal interest in controlling unruly demonstrations." Id. That possibility was merely suggested as a possible benign explanation for the increase in charges.

The prosecutor did learn on May 15, however, that approximately forty defendants, including many who intended to proceed pro se, desired to stand trial and raise first amendment and various other defenses. 9/11/85 Tr. 16, 37. [7] As the court of appeals noted, the government had a substantial stake in avoiding trial. App. to Cert. Pet. 10a. The burden of further proceedings facing the prosecutor here is more akin to the institutional burden cited as justification for the presumption applied by the Court in Blackledge and its progeny than to the relatively minimal and ordinary burden at issue in Goodwin. Unlike Goodwin, which involved but one defendant and one defense attorney; here the prosecutor faced a trial involving 36 defendants (many of whom were proceeding pro se) and two defense attorneys.

Lafayette Park. See e.g., 50 Fed. Reg. 33571, 33575 col. 1 (Aug. 20, 1985) (proposed regulations governing demonstrations in Lafayette Park).

7 Among the pretrial motions filed by respondents were motions requesting discovery, a jury trial and seeking dismissal based on, inter alia, defenses based on international law; common law "necessity"; various constitutional and other grounds; and a claim of vindictive prosecution. Memorandum and Order, United States v. Coleman et al., Nos. 85-363M, 85-404M, 85-421M (D.D.C. Sept. 6, 1985).

The court of appeals also found that the simple factual and legal context of the case cast doubt on the credibility of the prosecutor's speculation that members of the U.S. Attorney's office reconsidered the charges in light of the societal interest in controlling unruly demonstrations. App. to Cert. Pet. 9a; 9/11/85 Tr. 21. The government's proffered justification is also undermined by the prosecutor's action in dismissing the added charge on the day of trial.[8] If the prosecutor really was concerned with the societal interest in the case, he would have welcomed an opportunity to obtain a conviction of defendants from a representative sampling of the community.

The dismissal of the additional count was a key factor in convincing the court of appeals that the totality of circumstances indicated a realistic likelihood of vindictiveness in this case. App. to Cert. Pet. 9a-10a. This fact also was critical to Judge Silberman's decision to vacate the court of appeals initial order granting en banc reconsideration and reinstate the panel opinion. See App. to Cert. Pet. 35a.

The prosecutor's dismissal of the added charge undoubtedly was intended to avoid the further burden of a jury trial and to remove the taint of its alleged misbehavior by dismissing the added charge. The fact that the government's first action at the hearing on September 11, 1985, was to dismiss the second charge, 9/11/85 Tr. 2, highlights the government's effort to improve its chances of prevailing on the issue of vindictiveness. Having seen the writing on the wall, however, the government obviously was engaged in damage control, tying to prevent outright dismissal of the case.

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[8] On September 6, the trial court granted respondents' motion for a trial based on the aggregate penalty to which respondents were then subject, and also indicated that the issue of vindictive prosecution merited a hearing prior to trial.

There were other significant indicia of vindictiveness in the prosecutor's conduct prior to the September 11 hearing. At a meeting on September 3, 1985, involving Mr. Ellenbogen, respondent Childers and the prosecutor, apparently negotiations to stipulate to certain facts fell through, 9/11/85 Tr. 22, and, at some point, the prosecutor threatened Ms. Childers that he would seek jail time for those respondents who refused to stipulate to the facts. 9/11/85 Tr. 43-44.

Also, it must be emphasized that defendants were arrested in the context of the exercise of first amendment rights. The conduct which gave rise to respondents' arrest is substantially different than the ordinary criminal activity characteristic of Goodwin. Given respondent's protest against the policies of the current administration, it certainly is not inconceivable that the government harbored some animosity toward respondents. This is particularly true in the sense of the institutional bias of the government, which was the focus of the Court's concern in Blackledge and Thigpen. The government's various assertions that the first amendment context of the case is irrelevant to an examination of the indicia of vindictiveness (see 9/11/85 Tr. 32; Pet. for Cert. at 12 n.7) is a dangerous invitation to abandon well-settled doctrine that the government may not selectively prosecute an individual based solely on the person's exercise of a protected first amendment right. See Wayte v. United States, 470 U.S. 598 (1985).

II. NEITHER THE INITIAL AVAILABILITY OF FORFEITING A $50 COLLATERAL IN LIEU OF APPEARING ON THE CHARGE NOR THE PROSECUTOR'S RENEWED OFFER OF FORFEITURE DISPELLED THE LIKELIHOOD OF VINDICTIVENESS

The government argues that, because the government indicated at the September 11 hearing that respondents remained free to exercise the forfeiture of collateral option up to the moment of trial, Bordenkircher protected the prosecutor's conduct. Pet. for Cert. at 11. In Bordenkircher, however, the defendant was

presented with the option of pleading guilty or facing increased charges prior to the filing of the enhanced charge. Similarly, in Goodwin, plea negotiations had broken down before the prosecutor filed a felony indictment.

As noted above, the record does not support the government's apparent contention that the forfeiture of collateral option remained open to respondents after the arraignment in which they pleaded not guilty and elected to be tried in the district court. Also, as previously noted, the Local Rule implementing the forfeiture of collateral option indicates that collateral only can be forfeited only while the case is within the jurisdiction of the magistrate. See text, supra, at 12 & n.4.

Even assuming the prosecutor had the power to renew the forfeiture option, the offer was not renewed until after the charges had been increased. While a defendant may point to facts occurring after the increased charge has been filed as evidence of vindictiveness, the government may not "moot" a claim of vindictiveness by citing failed plea negotiations occurring after the government has "upped the ante," or by dismissing the added count in an effort to dispel the aura of vindictiveness.

The decision below is firmly rooted in the unique factual circumstances of this case; the impact and reach of its holding is narrow. The decision does not mark a radical departure from Goodwin or other precedent. For these reasons, the case does not present questions which are sufficiently compelling to warrant granting the government's petition.

III. IN LIGHT OF THE FINDING OF ACTUAL VINDICTIVENESS, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ENTIRE CASE

The government posits that a district court is without power to dismiss a charge "untainted" by vindictiveness where the "tainted" charge is dismissed on the government's own motion. Were the Court to adopt this position, the prosecutor would gain

a power inconsistent with statutory and constitutional restraints limiting the scope and nature of the government's prosecutorial powers. The court of appeals correctly concluded that the cases which the government cites do not support the government's limited view of the equitable powers of the district court. See App. to Cert. Pet. 13a-14a. The government has not cited any authority that squarely supports its position. Nor has the government offered any reason for such a radical emasculation of the inherent powers of the district courts.

Clearly, a district court must have available to it the remedy of dismissal where other options are either unavailable or incapable of fostering a sufficiently deterrent effect on the government. Stripped of authority to dismiss a case where circumstances demand an admittedly extreme remedy, district courts would lose the ability to enforce effectively the constraints which due process and equal protection impose on governmental conduct. The government's position also would undermine the essential principle that ours is a government of laws and not of men [and women]. See e.g., Oyler v. Boles, 368 U.S. 448 (1962) (prohibiting prosecution based on defendant's race or color); Berger v. United States, 295 U.S. 78 (1935).

The government also argues that a conflict exists among the circuit courts of appeals regarding dismissal as a remedy for prosecutorial vindictiveness. As respondent Hand notes in her Brief in Opposition, however, no such conflict exists. No other court has held that a district court abused its discretion in dismissing an information based on a finding of actual vindictiveness. Rather, the cases indicate that district courts must have latitude to fashion remedies sufficiently effective to ameliorate the harm to the institutional integrity of the administration of criminal justice occasioned by the prosecutor's misconduct.

The government does not indicate a sufficient basis upon which to overturn the district court's remedy of dismissal. Rather, the remedy chosen by the district court was well within its power and should not be reviewed by this Court.

IV. THE DECISION OF THE COURT BELOW WILL NOT IMPAIR THE EFFECTIVENESS OF THE FORFEITURE OF COLLATERAL SYSTEM

The government's dire predictions of the dangerous consequences of the decision below are purely speculative and too ephemeral to warrant review by this Court. As previously noted, government attorneys generally are present (as they apparently were in this case) during major demonstrations to supervise, direct and provide advice to the police. The notion that government attorneys do not provide any input into the initial charging decision when arrests result from a large demonstration is supported neither in the record nor by common sense.

Also, the government remains free to add charges should new information come to the prosecutor's attention that merits reexamination of the significance of the case. Most important, the government can proffer the objective bases for its decision to increase an initial charge. Only improper motivations in adding or instituting a charge subject the government to potential dismissal of a case. Where such an improper motivation is present, dismissal also inures to the public benefit.

Finally, there is a substantial question whether the forfeiture of collateral option is available once a defendant elects to be tried in the district court. See text, supra, at 12 & n.4. Thus, the government's entire argument may be constructed on a faulty premise. In the absence of any record evidence regarding the details of administration of the forfeiture of collateral system, the Court should be reluctant to decide issues which are premised on the government's conclusory representation

that the forfeiture of collateral option remained open to defendants through and until the moment of trial.

V. EVEN IF THE COURT OF APPEALS ERRED IN APPLYING A PRESUMPTION OF VINDICTIVENESS, THE DISTRICT COURT'S FINDING OF ACTUAL VINDICTIVENESS WOULD STILL REQUIRE AFFIRMANCE OF THE JUDGMENT BELOW

The court of appeals did not to reach the question whether the district court's finding of actual vindictiveness should be affirmed. The court did accurately identify the relevant standards of review, noting that the finding of vindictiveness could be overturned only if clearly erroneous and that dismissal of the information could be reversed only if the district court abused its discretion in ordering dismissal. See App. to Cert. Pet. 4a-5a.

Even if the Court agrees that the question whether a pretrial presumption of vindictiveness ever can be applied in a pretrial setting presents a substantial federal question, the Court need not reach that issue in this case because the district court premised its holding on a finding of actual vindictiveness. See 9/11/85 Tr. 27, 50. The Court in Goodwin expressly sanctioned the power of the district court to premise a finding of vindictiveness upon objective evidence of actual vindictiveness. 457 U.S. at 380 n.12, 384.

In light of the evidence proffered by respondents, the district court's finding was amply supported by the record and could not be characterized as clearly erroneous. In any event, the legal sufficiency of the district court's finding of vindictiveness and its subsequent dismissal of the information are questions which should be resolved by the court of appeals in the first instance. At most, the Court should remand the case to the court of appeals to resolve this issue.

CONCLUSION

The decision by the court of appeals did not depart from precedent of this Court or create a conflict with other courts of appeals addressing the question of the application of the doctrine of prosecutorial vindictiveness to the pretrial setting. Moreover, the district court's finding of actual vindictiveness provides a basis for affirming the judgment below which does not require resolution of the first question presented in the governments petition. Respondent Daily therefore urges the Court to deny the government's petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Respondent Daily

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)

V.) CRIMINAL NOS. 85-329
85-330
THERESA FITZGIBON, ET AL.,) 85-331

DEFENDANTS)

WASHINGTON, D.C.

SEPTEMBER 11, 1985

THE ABOVE-ENTITLED MATTER CAME ON FOR TRIAL BEFORE THE HONORABLE AUBREY E. ROBINSON, JR., CHIEF JUDGE, AT 9:45 A.M.

APPEARANCES:

ROBERT MC DANIEL, AUSA
FOR THE GOVERNMENT

DANIEL ELLENBOGEN, ESQ.
SEBASTIAN GRABER, ESQ.
FOR THE DEFENDANTS

DAWN T. COPELAND
OFFICIAL COURT REPORTER

PROCEEDINGS

THE DEPUTY CLERK: UNITED STATES OF AMERICA V. THERESA FITZGIBON, ET AL. CRIMINAL NOS. 85-329, 85-330. CRIMINAL NO. 85-331.

MR. ROBERT MC DANIEL FOR THE GOVERNMENT AND MR. DANIEL ELLENBOGEN AND SEBASTIAN GRABER FOR THE DEFENDANTS.

THE COURT: ARE YOU READY TO PROCEED?

MR. MC DANIEL: YES, YOUR HONOR.

THE COURT: MR. MC DANIEL.

MR. MC DANIEL: IF IT PLEASE THE COURT, I HAVE A NUMBER OF BRIEF PRELIMINARY MATTERS.

THE COURT: ALL RIGHT.

MR. MC DANIEL: FIRST, I WOULD ASK LEAVE OF THE COURT TO HAVE MISS JUNE THOMAS, A PARALEGAL EMPLOYED BY THE UNITED STATES ATTORNEY'S OFFICE, TO SIT WITH ME AT COUNSEL TABLE.

THE COURT: YES.

MR. MC DANIEL: I WOULD LIKE TO MOVE, IF IT PLEASE THE COURT, IN EACH OF THE INFORMATIONS, TO DISMISS COUNT ONE AND LEAVE REMAINING ONLY COUNT TWO IN EACH CASE.

THE COURT: DO YOU WANT TO BE HEARD ON THAT, MR. ELLENBOGEN.

MR. ELLENBOGEN: IF IT PLEASE THE COURT, I WOULD OBJECT TO THE GOVERNMENT'S WITHDRAWAL OF COUNT TWO OF THE INFORMATION INSOFAR AS IT SIMPLY IS AN EFFORT --

THE COURT: IT IS COUNT ONE.

MR. ELLENBOGEN: TO WITHDRAW COUNT ONE, EXCUSE ME.

I OBJECT TO THE GOVERNMENT'S DISMISSING THAT INSOFAR AS IT IS MOTIVATED SOLELY FOR THE PURPOSE OF DEPRIVING THE DEFENDANTS OF THEIR RIGHT TO A JURY TRIAL AS THIS COURT HAS ALREADY ORDERED.

TO THAT EXTENT, I WOULD ASK THAT THE GOVERNMENT NOT BE PERMITTED AT THIS LATE DATE TO DISMISS ONE OF THOSE COUNTS.

I WILL ADDRESS THE POINT FURTHER IN MY ARGUMENT ON THE ISSUE OF VINDICTIVE PROSECUTION.

THE COURT: MR. MC DANIEL.

MR. MC DANIEL: YOUR HONOR, I WOULD SUBMIT.

THE COURT: I DO NOT THINK IT IS THE PREROGATIVE OF THE COURT TO TELL THE GOVERNMENT WHETHER IT IS GOING TO PROCEED WITH A CRIMINAL PROSECUTION OR NOT.

I THINK I AM REQUIRED TO GRANT THE GOVERNMENT'S MOTION TO DISMISS.

THE MOTION IS GRANTED AS TO EACH DEFENDANT.

MR. MC DANIEL: MAY IT PLEASE THE COURT, YOUR HONOR, MY LAST PRELIMINARY MATTER IS TO DISMISS AGAINST SEVERAL OF THE INDIVIDUALS WHOSE NAMES I HAVE PROVIDED TO THE COURT CLERK.

THEY ARE, FOR THE RECORD, DEFENDANTS BABSON,

COHEN, GOANS, KLEIN, SNYDER, GROW AND SAWYER.

THE COURT: DO YOU HAVE THAT LIST?

MR. ELLENBOGEN: NO, YOUR HONOR. THIS IS THE FIRST I HAVE HEARD OF THAT.

THE COURT: THAT IS WHY WE HAVE A HEARING IN COURT. THAT IS NOT UNUSUAL.

I WILL ASK YOU TO REPEAT THE LIST.

MR. MC DANIEL: YES, YOUR HONOR.

THE NAMES ARE BABSON, B-A-B-S-O-N, COHEN, C-O-H-E-N, GOANS, G-O-A-N-S, KLEIN, K-L-E-I-N, SNYDER, S-N-Y-D-E-R, GROW, G-R-O-W AND SAWYER IS S-A-W-Y-E-R.

THE COURT: MR. ELLENBOGEN, DO YOU WANT TO MAKE A RECORD ON THAT, TOO?

MR. ELLENBOGEN: THAT IS DISMISSING THE REMAINING COUNT THAT IS LEFT IN THE INFORMATION, IF I UNDERSTAND IT?

MR. MC DANIEL: YES.

THE COURT: ALL RIGHT.

DO YOU WISH TO BE HEARD? STATE YOUR NAME.

MR. GOANS: MY NAME IS ARTHUR GOANS. I AM PRO SE IN THIS CASE AND I WOULD LIKE TO KNOW WHY HE IS DISMISSING THESE CHARGES AT THIS TIME.

THE COURT: EVEN I CAN'T ASK THE GOVERNMENT THAT.

MR. GOANS: ALL RIGHT.

THE COURT: THE GOVERNMENT PROSECUTES AND WE TRY.

WE CAN ONLY TRY WHAT THEY PROSECUTE.

MR. ELLENBOGEN: WE TRY ALSO, YOUR HONOR.

THE COURT: NOW, DON'T GET CUTE WITH ME. YOU DON'T TRY. YOU ARE A LAWYER REPRESENTING LITIGANTS.

MR. ELLENBOGEN: OK.

YOUR HONOR, THERE ARE FOUR INDIVIDUALS WHO I INITIALLY ENTERED APPEARANCES FOR AND AFTER DISCUSSION WITH THESE DEFENDANTS, IT IS THEIR INTENTION TO PROCEED PRO SE.

THE COURT: GIVE US THEIR NAMES, PLEASE.

MR. ELLENBOGEN: I ASK PERMISSION TO WITHDRAW FROM THIS CASE FOR THE DEFENDANTS MARGARET ARTEAGA, THERESE FITZGIBON, JUDITH HAND AND VIRGINIA SENDERS.

THE COURT: ARE EACH OF THOSE PERSONS HERE THIS MORNING, AND YOU CONCUR IN COUNSEL'S MOTION TO WITHDRAW AND YOU WISH TO PROCEED PRO SE?

IS THAT CORRECT?

MISS ARTEAGA: YES, YOUR HONOR.

THE COURT: ALL RIGHT. YOUR MOTION IS GRANTED.

MR. ELLENBOGEN: THANK YOU VERY MUCH, YOUR HONOR.

THERE IS ANOTHER PRELIMINARY MATTER BEFORE WE GET TO THE ISSUE OF VINDICTIVE PROSECUTION, YOUR HONOR.

I WOULD LIKE AT THIS POINT TO MAKE A GENERAL MOTION TO DISMISS BASED ON VARIOUS ABUSES BY THE GOVERNMENT IN TERMS OF PROVIDING COUNSEL WITH DISCOVERY IN THIS CASE.

TO DATE, UNDER THE RULES OF DISCOVERY. COUNSEL HAS NOT BEEN PROVIDED WITH COPIES OF THE PHOTOGRAPHS THAT THE GOVERNMENT INTENDS TO INTRODUCE AT TRIAL.

COUNSEL HAS NOT BEEN PROVIDED WITH COPIES OF ARREST RECORDS FOR ANY OF THE DEFENDANTS AND COUNSEL HAS ONLY JUST THIS MORNING BEEN PROVIDED WITH COPIES OF VIDEO-TAPES WHICH THE GOVERNMENT HAS ASSURED BOTH MYSELF AND YOUR HONOR AT THE PRETRIAL CONFERENCE THAT WE HAD IN JUNE THAT NO SUCH TAPES DID EXIST.

INITIALLY THE GOVERNMENT CAME ACROSS LAST WEEK AND YESTERDAY I WAS INFORMED THAT THERE WERE ADDITIONAL TAPES.

NOW, AT THIS POINT, I'VE NOT HAD AN OPPORTUNITY TO VIEW HALF OF THE VIDEOTAPE WHICH I EXPECT THE GOVERNMENT WILL SEEK TO INTRODUCE.

SINCE THE VIDEOTAPE WAS WITHIN THE CUSTODY OF THE PARK POLICE, I WOULD SAY THAT THE GOVERNMENT WAS UNDER AN OBLIGATION TO EXERCISE DUE DILIGENCE TO PRODUCE THAT . IN A TIMELY FASHION SO THAT THE DEFENDANTS COULD HAVE AN OPPORTUNITY TO EXAMINE IT, THIS INFORMATION, AND SO THEY COULD ADDRESS AT TRIAL -- THIS IS MAKING IT DIFFICULT TO ENTER INTO THE STIPULATIONS BY VIRTUES OF THIS AND I WOULD SUBMIT THAT THIS LATE DISCOVERY OF THE VIDEOTAPE CAUSES US A BIT OF UNDUE HARDSHIP IN TERMS OF A TWO AND A HALF MONTH PREPARATION OF CERTAIN DEFENSES WHICH WERE BROUGHT

TO THIS COURT'S ATTENTION IN JUNE AND WHICH ARE NOW OF QUESTIONABLE MERIT SINCE COUNSEL IN GOOD FAITH COULD NOT PRESENT THOSE AND THAT WOULD NOT HAVE BEEN NECESSARY TO CONTINUE THIS CASE BACK IN JULY HAD THE INFORMATION BEEN PROVIDED.

SO IN TERMS OF THE FACT THAT THE GOVERNMENT HAS NOT PROVIDED ANY OF THE INFORMATION THAT IS REQUIRED -- THAT IT IS REQUIRED TO PROVIDE UNDER RULE 16 OF THE RULES OF DISCOVERY, I WOULD ASK THIS COURT FOR IMPOSITIONS OF SANCTIONS.

FIRST, I WOULD ASK THAT THE INFORMATION -- THAT THE REMAINING COUNT BE DISMISSED AND ADDITIONALLY, THERE ARE ARREST REPORTS PROVIDING PROBABLE CAUSE FOR THIS PROSECUTION AND THOSE HAVE NOT BEEN PROVIDED.

EXCUSE ME. LET ME CORRECT THAT. ARREST REPORTS HAVE ONLY BEEN PROVIDED FOR EIGHT DEFENDANTS.

THERE HAS BEEN AN ONGOING CONTINUING PROMISE BY THE GOVERNMENT TO PROVIDE THEM BUT IT HAS JUST BEEN AN EMPTY PROMISE.

SO I WOULD ASK YOUR HONOR IN THE COURT'S DISCRETION BY VIRTUE OF THE HARDSHIP THAT THIS IS IMPOSING ON COUNSEL --

THE COURT: I AM NOT CLEAR AS TO WHAT YOU ARE SAYING ABOUT ARRESTS. YOU SAID ARREST RECORDS?

MR. ELLENBOGEN: YES. ARREST RECORDS AND ARREST REPORTS.

THE COURT: NOW, WHAT ARREST RECORDS ARE YOU TALKING ABOUT?

MR. ELLENBOGEN: I HAVE REASON TO BELIEVE THAT THE GOVERNMENT MAY SEEK TO INTRODUCE ARREST RECORDS FOR DEFENDANTS --

THE COURT: YOU ARE TALKING ABOUT IN OTHER CASES?

MR. ELLENBOGEN: YES, AS OPPOSED TO THIS CASE.

THE COURT: NOW, DO YOU HAVE SOMETHING ELSE IN CONNECTION WITH ARREST RECORDS?

MR. ELLENBOGEN: NO, BUT THE ARREST REPORTS THAT WERE INITIALLY LODGED.

THE COURT: IN THIS CASE?

MR. ELLENBOGEN: IN THIS CASE.

THE ARREST REPORTS THAT THE OFFICERS MADE AT THE TIME OF THE ARREST AND THAT INFORMATION HAS NOT BEEN PROVIDED.

THE PHOTOGRAPHS THE GOVERNMENT ASSURED ME DID EXIST AND THE GOVERNMENT SEEKS TO USE IN ITS CASE IN CHIEF AGAINST THE DEFENDANTS, THE DEFENDANTS I AM REPRESENTING AND THE DEFENDANTS THAT ARE PROCEEDING PRO SE, HAVE NOT BEEN MADE AVAILABLE FOR INSPECTION OR COPYING.

THE VIDEOTAPE, I THINK THAT SPEAKS TO ITSELF, YOUR HONOR.

I WOULD ASK IN LIGHT OF THIS THAT THIS COURT EXERCISE ITS DISCRETION AND DISMISS THE REMAINING COUNT

IN THE INFORMATION.

I DON'T THINK A CONTINUANCE IS AN APPROPRIATE REMEDY GIVEN THE HARDSHIP IT IS GOING TO IMPOSE ON EVERYONE HAVING TO COME BACK AGAIN AND IN THE ALTERNATIVE, YOUR HONOR, IF YOU WILL NOT DISMISS THE REMAINING COUNT BECAUSE OF THIS ABUSE OF DISCOVERY, I WOULD ASK THE COURT TO ENTER AN ORDER PRECLUDING THE GOVERNMENT FROM USING EITHER THE VIDEOTAPE, THE PHOTOGRAPHS OR THE ARREST REPORTS IN ITS CASE IN CHIEF, AND I ASK THAT THAT EVIDENCE BE SUPPRESSED.

THE COURT: ALL RIGHT.

MR.MC DANIEL?

MR. MC DANIEL: IF IT PLEASE THE COURT, THE GOVERNMENT WOULD TAKE EXCEPTION TO THE REPRESENTATION THAT IT HAS FAILED TO PROVIDE ANY INFORMATION PURSUANT TO DISCOVERY.

A NUMBER OF DISCOVERY CONFERENCES WERE HELD WHERE THE CONTENTS OF EACH AND EVERY ARREST REPORT WAS DESCRIBED IN DETAIL.

COUNSEL FOR THE DEFENDANTS WAS ADVISED THAT THESE ARREST REPORTS WOULD VARY ONLY IN THE RESPECT OF THE DEFENDANT'S NAME.

WITH RESPECT TO THE ARREST RECORDS, THE GOVERNMENT DOES NOT INTEND TO INTRODUCE ANY EVIDENCE OF ANY PRIOR ARRESTS ON THE PART OF ANY INDIVIDUAL.

WITH REGARD TO THE PHOTOGRAPHS THAT WERE TAKEN BY THE POLICE FOR PURPOSES OF IDENTIFICATION, THE GOVERNMENT

DOES NOT INTEND TO INTRODUCE THAT IN ITS EVIDENCE IN ITS CASE IN CHIEF AND WITH RESPECT TO THE VIDEOTAPE, ALL VIDEOTAPES THAT WERE KNOWN TO EXIST BY THE UNITED STATES ATTORNEY'S OFFICE WERE PRODUCED IN A MEETING BETWEEN MYSELF, MISS JUNE THOMAS, COUNSEL FOR THE DEFENDANTS AND JO ELLEN CHILDERS WHO WAS REPRESENTING HERSELF ON AN AFTERNOON LAST WEEK AND THEY WERE GIVEN UNLIMITED TIME TO VIEW THE APPROXIMATELY ONE HOUR OF VIDEOTAPE THAT WAS AVAILABLE TO US AT THAT POINT AND COPIES WERE SUBSEQUENTLY MADE BY THE U.S. PARK POLICE AND TURNED OVER TO MR. ELLENBOGEN.

YESTERDAY, YOUR HONOR, THE GOVERNMENT DISCOVERED THE EXISTENCE OF FOUR ADDITIONAL PIECES OF VIDEOTAPE. I HAVE HAD THOSE COPIES AND I CAN ONLY CONFESS THAT WE WERE ONLY ABLE TO PROVIDE THEM JUST THIS MORNING TO MR. ELLENBOGEN AND I RECOGNIZE THE DIFFICULTIES THAT THAT PRESENTS.

I CAN REPRESENT TO THE COURT THAT THE REASON WHY THOSE WERE NOT PRODUCED EARLIER IS SIMPLY BECAUSE THEY WERE OVERLOOKED BY THE OFFICIALS OF THE UNITED STATES PARK POLICE.

THE COURT: MR. ELLENBOGEN?

MR. ELLENBOGEN: YES, YOUR HONOR. TO THE CONTRARY TO WHAT THE U.S. ATTORNEY IS REPRESENTING, HE DID ASSURE ME THAT CONTENTS OF REPORTS MAY HAVE BEEN SIMILAR BUT THE EIGHT REPORTS -- THE ARREST REPORTS THAT I HAVE BEEN PROVIDED, THERE ARE NO TWO OF THEM THAT READ IDENTICAL.

I HAVE NO REASON TO BELIEVE THAT THE REMAINING 39 OR 45 OR HOW MANY THERE ARE ARE GOING TO ALSO BE IDENTICAL.

THE COURT: ARE THEY AVAILABLE NOW?

MR. MC DANIEL: THEY ARE, YOUR HONOR.

MR. ELLENBOGEN: IN ADDITION, YOUR HONOR, I WOULD POINT OUT THAT RULE 16 DOES NOT REQUIRE THE UNITED STATES -- THE U.S. ATTORNEY TO PROVIDE INFORMATION THAT IS SOLELY IN THE POSSESSION OF THE U.S. ATTORNEY BUT INFORMATION THAT IS IN THE CUSTODY OR CONTROL OF THE GOVERNMENT, THE EXISTENCE OF WHICH IS KNOWN OR BY THE EXERCISE OF DUE DILIGENCE MAY BECOME KNOWN TO THE ATTORNEY FOR THE GOVERNMENT AND THAT IS READING DIRECTLY FROM THE RULES, YOUR HONOR.

I WOULD POINT OUT THAT WE HAD A CONFERENCE IN CHAMBERS IN JUNE WHERE WE DISCUSSED THE PRESENCE OF VIDEO-TAPES AND THE U.S. ATTORNEY HAD REPRESENTED THAT HE HAD MADE INQUIRY OF THE PARK POLICE AND WAS TOLD THAT NO SUCH TAPE EXISTED.

THE COURT: MR. ELLENBOGEN, LET'S NOT GO BACK TO NOAH'S ARK.

THE FACT IS THAT SOME VIDEOTAPE WAS PRODUCED. IS THAT CORRECT?

MR. ELLENBOGEN: SOME.

THE COURT: ALL RIGHT. SOME. YOU DIDN'T EVEN ACKNOWLEDGE THAT IN YOUR INITIAL PRESENTATION.

MR. ELLENBOGEN: YES, I DID.

THE COURT: NO, YOU DIDN'T. YOU SAID YOU DID NOT HAVE VIDEOTAPE DISCOVERY. THAT IS WHAT YOU TOLD ME.

SO YOU HAVE HAD SOME VIDEOTAPE DISCOVERY AND NOW THE QUESTION IS, WHAT DO WE DO ABOUT THESE PORTIONS THAT ALLEGEDLY JUST APPEARED YESTERDAY. THAT IS THE QUESTION, IS IT NOT?

MR. ELLENBOGEN: YES, AND THE INFERENCE IS TO WHAT OTHER INFORMATION MAY BE ALSO AVAILABLE.

THE COURT: WELL, I TELL YOU, IF WE WAIT LONG ENOUGH, THERE MAY BE A WHOLE LOT OF STUFF THAT TURNS UP IF WE CONTINUE THE INVESTIGATION FOR ANOTHER SIX, EIGHT, TEN OR FOURTEEN MONTHS. THAT HAPPENS INEVITABLY IN A CRIMINAL PROSECUTION AND YOU CAN GO AND INVESTIGATE AND INVESTIGATE AD INFINITUM.

YOU DID SEE A CONSIDERABLE PORTION OF WHAT THEY SAID THEY HAD AT THAT TIME AND THE QUESTION IS WHAT ABOUT THE OTHER TAPES THEY HAVE.

THERE ARE TWO WAYS TO HANDLE THAT, EITHER EXCLUDE IT OR GIVE YOU THE OPPORTUNITY TO LOOK AT IT BECAUSE IT MAY PROVE BENEFICIAL AT THIS JUNCTURE IN CONNECTION WITH THE DEFENSE'S CASE.

WHAT DO YOU WANT TO DO?

MR. ELLENBOGEN: I WOULD ASK THAT IT BE EXCLUDED, YOUR HONOR.

THE COURT: WHAT IS YOUR PROBLEM WITH THAT?

MR. MC DANIEL: YOUR HONOR, I DO NOT OBJECT TO THE EXCLUSION OF THAT.

THE COURT: THAT IS EXACTLY RIGHT. DON'T WORRY ABOUT WHAT YOU HAVE NOT SEEN.

WHEN IT COMES TO THE ARREST RECORDS, THE ARREST RECORDS ARE NOT THAT LONG OR DETAILED, ARE THEY?

I WILL GIVE YOU THE OPPORTUNITY TO LOOK AT THE ARREST RECORDS OF EVERY INDIVIDUAL BEFORE THE CONCLUSION OF THE TRIAL. YOU CAN MAKE OUT OF THEM WHAT YOU WILL IN CONNECTION WITH YOUR CROSS-EXAMINATION OF ANY GOVERNMENT WITNESSES.

MR. ELLENBOGEN: FINE.

I WOULD ALSO LIKE TO ASK A BIT OF CLARIFICATION. SO THE GOVERNMENT DOES NOT INTEND TO INTRODUCE PHOTOGRAPHS AS EVIDENCE, AND THE FACT THAT THOSE HAVE NOT BEEN MADE AVAILABLE FOR INSPECTION OR COPYING AS THE RULES REQUIRE, THAT THE GOVERNMENT BE PRECLUDED FROM USING THOSE IN ANY CAPACITY.

THE COURT: THERE IS NO QUESTION ABOUT THAT. THE GOVERNMENT HAS REPRESENTED THAT IT HAS NO INTENTION OF USING THEM.

IS THAT CORRECT? ARE THOSE PHOTOGRAPHS AVAILABLE?

MR. MC DANIEL: THEY ARE.

THE COURT: THEN THEY SHOULD BE MADE AVAILABLE TO THE DEFENDANTS FOR WHATEVER USE THEY MAY CHOOSE TO MAKE OF THEM.

MR. ELLENBOGEN: THANK YOU, YOUR HONOR.

THE COURT'S INDULGENCE?

THE COURT: YES.

MR. ELLENBOGEN: MAY IT PLEASE THE COURT, I AM READY TO PROCEED ON THE ARGUMENT FOR VINDICTIVE PROSECUTION.

THE COURT: ALL RIGHT.

MR. ELLENBOGEN: I WOULD LIKE TO FIRST REITERATE FOR THE RECORD AS IT HAS ALREADY BEEN PRESENTED IN THAT MOTION.

THE GOVERNMENT AT THIS JUNCTURE NOW HAS THE BURDEN OF GOING FORWARD TO PROVE -- TO ESTABLISH THAT SUCH PROSECUTION HAS NOT BEEN VINDICTIVE.

HOWEVER, I AM ALSO PREPARED TO INTRODUCE AND PUT ON TESTIMONY AND SUBMIT EVIDENCE TO FURTHER BOLSTER THE CLAIMS THAT THIS IS FOR VINDICTIVE PROSECUTION AND SO IF YOUR HONOR WISHES --

THE COURT: LET ME HEAR YOUR ARGUMENT AND THEN WE WILL DETERMINE WHETHER OR NOT THERE IS AN EVIDENTIARY REQUIREMENT NEEDED TO BUTTRESS YOUR ARGUMENT.

MR. ELLENBOGEN: THE ARGUMENT IS THAT BASICALLY THE GOVERNMENT'S ACTION IN DECIDING TO PROSECUTE INITIALLY FOR AN EXERCISE OF FIRST AMENDMENT RIGHTS GIVE RISE TO A CLAIM OF A VINDICTIVE PROSECUTION IN TERMS OF THE INITIAL INFORMATION THAT WAS FILED.

THE GOVERNMENT IN THIS TWO COUNT INFORMATION,

WHICH INFORMATION WAS FILED AFTER -- IF I COULD BACKTRACK FOR A MOMENT AND DO THIS CHRONOLOGICALLY.

THE COURT: I THINK YOU HAVE TO BECAUSE THAT IS THE ESSENCE OF THE CLAIM.

MR. ELLENBOGEN: ON MAY 15TH, THE DATE INITIALLY SCHEDULED FOR THE APPEARANCES AT TRIAL, IT BECAME RATHER OBVIOUS TO EVERYONE INVOLVED THAT THE GOVERNMENT HAD FAILED TO PROVIDE ADEQUATE NOTICE TO THE DEFENDANTS TO APPEAR FOR THAT ARRAIGNMENT -- FOR THAT APPEARANCE.

AT A MEETING HELD BETWEEN MYSELF, REPRESENTATIVES OF THE CLERK'S OFFICE AND MAGISTRATE DWYER'S CHAMBERS, WE RESOLVED TO ESTABLISH A THREE-TIERED ARRAIGNMENT SCHEDULE.

AT THE MAY 15TH MEETING, THE GOVERNMENT HAD NO INFORMATION AVAILABLE TO PRESENT OR FILE AGAINST PEOPLE.

MAY 28, WHICH WAS THE FIRST DAY OF THE ARRAIGNMENTS, THE GOVERNMENT ALL OF A SUDDEN FILED AN INFORMATION THAT ALLEGED TWO COUNTS, TWO VIOLATIONS.

AT THAT POINT IT BECAME RATHER -- THOSE DEFENDANTS WHO APPEARED ON THE 29TH, WERE NEVER ADVISED THAT THE TWO CHARGES HAD BEEN LODGED AGAINST THEM AND MANY OF THEM WERE RATHER SURPRISED AND UPSET THAT TWO COUNTS HAD BEEN LODGED TO THAT EFFECT.

NOW, IT APPEARS THAT THE SIMPLE BASIS FOR THE TWO COUNTS WAS NOT TO ACHIEVE ANY LEGITIMATE PROSECUTORIAL END BUT IT WAS OBVIOUS TO THE GOVERNMENT AFTER THE MAY

15TH MEETING THAT THE PEOPLE WERE GOING TO COME TO COURT AND WERE GOING TO CHALLENGE THE ARRESTS AND MAKE THE GOVERNMENT PROVE THEIR CASE AGAINST THEM.

IT IS FOR THAT REASON, THEIR EXERCISE OF THEIR RIGHT TO TRIAL, THAT THE GOVERNMENT FILED THE TWO-COUNT INFORMATION.

ON THE DAY OF THE ARRAIGNMENTS, THERE WAS ANOTHER DEMONSTRATION OCCURRING IN WASHINGTON.

AT THAT POINT, THIS -- THIS WAS A SEPARATE DEMONSTRATION, A DIFFERENT GROUP.

THERE WERE A NUMBER OF PEOPLE INVOLVED IN THAT--

THE COURT: I DON'T THINK THAT HAS ANYTHING TO DO WITH THIS CASE.

I DON'T THINK IT DOES. WHAT IS THE RELEVANCE OF THAT TO THIS CASE?

MR. ELLENBOGEN: THE RELEVANCE IS -- THE RELEVANCE, I BELIEVE, YOUR HONOR, IS THAT THOSE DEFENDANTS, A NUMBER OF WHOM WERE ARRESTED AT THE WHITE HOUSE, WERE ENGAGING IN EXACTLY THE SAME CONDUCT AND THEY DECIDED THEY WOULD ENTER A GUILTY PLEA AT WHICH TIME THE GOVERNMENT FILED A ONE-COUNT INFORMATION. I HAVE A COPY OF THAT THAT I CAN TENDER TO THE COURT.

I SUBMIT IN THIS CASE THAT THE TWO COUNTS BEING CHARGED IN THIS INFORMATION WAS SOLELY FOR THE PURPOSE OF COERCING OR PRESSURING THE DEFENDANTS TO ENTER GUILTY

PLEAS OR TO PAY THE $50 FINE WITH THE THREAT OF PROSECUTION AND A YEAR OF PRISON BEHIND THAT SHOULD THEY CHOOSE TO EXERCISE THEIR RIGHT TO TRIAL; THE RIGHT TO CONFRONT EVIDENCE AND TESTIMONY AGAINST THEM; THE RIGHT TO PRESENT WITNESSES ON THEIR OWN BEHALF AND THE FULL PLANOPLY OF RIGHTS THAT ATTACHES TO ONE'S RIGHT TO TRIAL.

NOW, THE GOVERNMENT IN ITS RESPONSE TO MY REQUEST POINTED OUT THAT THERE WAS A PLEA OFFER THAT HAS REMAINED OPEN TO ALL DEFENDANTS.

I AM PREPARED TO PUT ON WITNESSES AND SUBMIT TESTIMONY THAT THAT IS NOT AN ACCURATE -- A CORRECT REPRESENTATION AND THE WITNESSES THAT WERE PRESENT AT BOTH THE FIRST AND THE SECOND ARRAIGNMENTS WILL STATE THAT THERE WAS NO MENTION OF ANY PLEA OFFER AND WOULD ALSO REPRESENT THAT THERE ARE WITNESSES WHO WILL TESTIFY THAT THE OPPORTUNITY TO PAY THE $50 COLLATERAL AS THE U.S. ATTORNEY HAS INDICATED AND REPRESENTED HAS NEVER BEEN MADE KNOWN TO THE DEFENDANTS NOR HAS IT BEEN MADE KNOWN TO COUNSEL.

I AM AWARE THAT A NUMBER OF PEOPLE MAY HAVE GONE AHEAD AND SENT IN THE $50 HOPING THE COURT WOULD ACCEPT IT AND THERE WAS ALWAYS THE RISK THAT THE COURT WOULD NOT AND IN FACT, SOME OF THE DEFENDANTS HAD THEIR $50 COLLATERAL RETURNED.

IN ADDITION, IN CONFERENCES WITH THE U.S. ATTORNEY, THERE IS TESTIMONY AND EVIDENCE TO BE SUBMITTED -- PRESENTED

TO THE FACT THAT A NUMBER OF THE DEFENDANTS WERE THREATENED WITH JAILTIME SHOULD THEY NOT ENTER INTO A STIPULATION WITH THE GOVERNMENT.

THE ONLY CONCLUSION I CAN COME TO IS THAT THERE IS REASON TO BELIEVE THAT THERE IS AN IMPROPER MOTIVATION BEHIND THIS PROSECUTION AND THE GOVERNMENT'S GOING AHEAD AND PRESENTING THAT PROSECUTION.

THE COURTS HAVE HELD IN A NUMBER OF SITUATIONS THAT THE HARM TO BE AVOIDED IN A VINDICTIVE PROSECUTION ARGUMENT IS SIMPLY THE APPREHENSION OF THE EXERCISE OF ONE'S RIGHTS AT THIS STAGE WILL RESULT IN SIGNIFICANT PENALTIES AND A NUMBER OF PEOPLE WERE EXTREMELY SHOCKED AND APPREHENSIVE OF THE FACT THAT THEY ARE NOW BEING TOLD EITHER STIPULATE TO THE FACTS IN THIS CASE OR WE ARE GOING TO ASK THAT YOU ARE GOING TO BE -- OR THAT YOU ARE GOING TO BE PUT IN JAIL FOR TEN DAYS AS WELL AS THE FACT EXERCISING THEIR RIGHT TO TRIAL AND ENTERING A NOT GUILTY PLEA IS RESULTING IN THE GOVERNMENT FILING CHARGES THAT COULD AMOUNT TO A YEAR IN JAIL OR A THOUSAND DOLLAR FINE.

GRANTED THE GOVERNMENT HAS NOW WITHDRAWN ONE OF THOSE COUNTS, THE BASIS OF THAT COUNT WAS NOT SO MUCH TO ALLEVIATE ANY VINDICTIVENESS BUT MERELY TO FURTHER DEPRIVE INDIVIDUALS OF THEIR RIGHT TO A JURY TRIAL.

IN ADDITION, YOUR HONOR, AT THE PROPER TIME, A PROPER FOCUS OF INQUIRY INTO VINDICTIVE PROSECUTION IS

THE GOVERNMENT'S CONDUCT AT THE OUTSET.

IT IS IRRELEVANT THAT THE CHARGE ISTRIED ULTIMATELY AND I HAVE AUTHORITY FOR THAT IF YOUR HONOR WISHES IT, SO I WOULD SUBMIT IN THIS CASE THAT THE GOVERNMENT'S OVERALL CONDUCT AND OVERALL POSTURE IN NOT PROVIDING INFORMATION, THREATENING THE DEFENDANTS WITH JAIL IF THEY DO NOT ENTER INTO STIPULATIONS, AS WELL AS INITIALLY BRINGING ENHANCED PENALTIES FOR WHICH PEOPLE WERE NEVER ARRESTED, ALL AMOUNTS TO AN IMPROPER MOTIVATION AND THAT THERE IS A VINDICTIVE ELEMENT TO THAT, AND THAT ON THOSE BASES, THE COURT HAS HELD -- COURTS HAVE HELD AND CONTINUE TO SO HOLD IN THE ABSENCE OF A SHOWING THAT THERE IS A PROPER PROSECUTORIAL MOTIVATION TO THE PROSECUTOR'S CONDUCT, THAT THE COURT MUST FIND THAT THERE IS VINDICTIVENESS AND DISMISS THE INFORMATION.

THE COURT: I WILL LET YOU RESPOND TO THE GOVERNMENT'S ARGUMENT.

MR. ELLENBOGEN: THANK YOU VERY MUCH.

THE COURT: MR. MC DANIEL?

MR. MC DANIEL: MAY IT PLEASE THE COURT, YOUR HONOR, THE UNITED STATES IS OF THE VIEW WITH RESPECT TO THIS ISSUE THAT THIS CASE IS --

THE COURT: HAVE A SEAT, MR. ELLENBOGEN.

MR. MC DANIEL: -- IS MOST CLOSELY COMPARED TO THE UNITED STATES V. GOODWIN IN WHICH A PROSECUTOR, ONCE

A DEFENDANT REJECTED A PLEA OFFER OF MISDEMEANORS AND PETTY OFFENSES, SOUGHT TO INDICT ON FELONY CHARGES THE SAME DEFENDANT FOR OFFENSES ARISING IN THE SAME COURSE OF CONDUCT. IT IS IN FACT THE TIMING THAT IS THE CRUCIAL DETERMINATION, I SUBMIT, FOR THE COURT TO MAKE AND THAT BECAUSE THIS INFORMATION WAS FILED DURING THE MONTH OF MAY, WITHIN APPROXIMATELY 30 DAYS OF THE EVENTS GIVING RISE TO THE OFFENSE, THAT IT WAS OF THE NATURE THAT IS DESCRIBED IN GOODWIN WHICH, OF COURSE, APPEARS AT 457 UNITED STATES, AND BEGINNING AT 368, ON PAGE 381 THE COURT STATED VERY CLEARLY THAT IN THE COURSE OF PREPARING A CASE FOR TRIAL, THE PROSECUTOR MAY UNCOVER ADDITIONAL INFORMATION THAT SUGGESTS A BASIS FOR FURTHER PROSECUTION OR SIMPLY COME TO REALIZE THAT THE INFORMATION PRESENTED BY THE STATE HAS A BROADER SIGNIFICANCE.

I WOULD SUBMIT TO THE COURT THAT IN LIGHT OF THE --

THE COURT: YES, BUT YOU DON'T HAVE THAT SITUATION HERE. THERE IS NO ADDITONAL INFORMATION THAT WASN'T AVAILABLE TO THE PROSECUTION AT THE VERY OUTSET WHEN THE ARRESTS WERE MADE.

MR. MC DANIEL: YOUR HONOR, I WOULD SUGGEST BECAUSE OF THE VAST NUMBER OF ARRESTS AND THE AMOUNT OF PAPER WORK THAT HAD TO BE PROCESSED --

THE COURT: IF WHAT YOU SAY IS TRUE, THEN THERE

WOULD BE DIFFERENT CHARGES AGAINST DIFFERENT INDIVIDUALS ARISING OUT OF THE ADDITIONAL INFORMATION.

MR. MC DANIEL: PERHAPS, YOUR HONOR.

THE COURT: YOU KNEW EVERYTHING EXCEPT THE DETAILS OF WHAT THE OFFICER WOULD TESTIFY TO AND THE CONFIRMATION OF THE ALLEGED MISCONDUCT WAS KNOWN AT THE TIME THAT THEY WERE GIVEN THE TICKET.

MR. MC DANIEL: THE FACTS WERE KNOWN, YOUR HONOR.

THE COURT: CERTAINLY THEY WERE KNOWN.

MR. MC DANIEL: THE RECOGNITION OF WHICH LEGAL THEORY THE GOVERNMENT WISHED TO PROCEED ON WAS A DIFFERENT MATTER. THAT IS SOMETHING THAT REQUIRED A CERTAIN AMOUNT OF CONTEMPLATION AND ANALYSIS BY MEMBERS OF THE UNITED STATES ATTORNEY'S OFFICE AND THAT WAS MOTIVATED, I WOULD SUGGEST, SOLELY BY A BALANCING OF THE SOCIETAL INTERESTS IN CONTROLLING UNRULY DEMONSTRATIONS AND THE RELATIVE GRAVITY OF THIS PARTICULAR OFFENSE GIVEN ITS EFFECT UPON THE COMMUNITY.

I WOULD LIKE TO ADD THAT THE OFFER FOR INDIVIDUALS TO FORFEIT THE $50 COLLATERAL REMAINS OPEN TO TODAY UP TO THE BEGINNING OF TRIAL AND HAS REMAINED OPEN THROUGHOUT.

I WOULD FURTHER SUGGEST TO THE COURT THAT AT NO TIME DURING PLEA NEGOTIATIONS DID THE UNITED STATES THREATEN OR INTIMATE THAT INDIVIDUALS WOULD BE INCARCERATED IN ANY FORM WHATSOEVER.

FURTHER, YOUR HONOR --

HE COURT: WELL, THE GOVERNMENT CAN'T DETERMINE WHO IS GOING TO BE INCARCERATED OR NOT. THE COURT HAS TO DETERMINE THAT AND THEN ONLY AFTER TRIAL. THE GOVERNMENT HASN'T ANYTHING TO DO WITH THAT.

MR. MC DANIEL: I RECOGNIZE THAT.

THE COURT: THE GOVERNMENT HAS NOTHING TO DO WITH THE FINE OR THE INCARCERATION.

MR. MC DANIEL: I RECOGNIZE THAT, YOUR HONOR.

IN ADDITION, WITH RESPECT TO THE STIPULATION, MR. ELLENBOGEN AND I DID IN FACT REACH AN AGREEMENT RESPECTING THE STIPULATION THAT WOULD PRESERVE APPELLATE RIGHTS AND SAVE THE COURT THE EXPENSE AND THE TROUBLESOMENESS OF AN EXTENDED TRIAL THAT INVOLVED A LARGE NUMBER OF DEFENDANTS. THAT AGREEMENT HAS FALLEN THROUGH SINCE THE TIME THAT IT WAS EFFECTED BY MR. ELLENBOGEN AND MYSELF.

I WOULD SUGGEST TO THE COURT THAT THE SITUATION WE HAVE HERE WITH RESPECT TO PROSECUTORIAL VINDICTIVENESS IS ONE THAT RESEMBLES THE PLEA BARGAIN STAGES, THE EARLY STAGES IN A CRIMINAL PROSECUTION. THE PROSECUTORIAL LATITUDES ARE VERY, VERY BROAD AND WHEN IT IS APPROPRIATE UP TO THE DAY OF TRIAL FOR THE PROSECUTOR TO CHANGE A THEORY OF PROSECUTION WITHOUT FEAR OF A CHALLENGE ON THE BASIS OF PROSECUTORIAL VINDICTIVENESS.

I WOULD SUGGEST THAT THERE IS NO PRESUMPTION

UNDER GOODWIN OR UNDER BORDENKIRCHER THAT OPERATES HERE AND THAT IN FACT AN ACTUAL DEMONSTRATION OF GENUINE VINDICTIVENESS OR ACTUAL MALICE IS SOMETHING THAT HAS TO BE DEMONSTRATED BY THE DEFENDANTS AT THIS STAGE AND THAT IS A HEAVY BURDEN THAT HAS NOT BEEN MET AND THAT BASED UPON THE DEFENDANTS' PROFFER, IT COULD NOT BE MET IN THE EVENT OF TESTIMONY.

I SUBMIT TO THE COURT THAT THE BEHAVIOR OF THE UNITED STATES WITH RESPECT TO THESE CHARGES WAS AN ENTIRELY APPROPRIATE EXERCISE OF PROSECUTORIAL DISCRETION.

THE COURT: MR. ELLENBOGEN?

MR. ELLENBOGEN: I WOULD LIKE TO BRIEFLY RESPOND TO SOME OF THE GOVERNMENT'S REPRESENTATIONS.

FIRST OF ALL, WE SUBMIT THAT THERE WAS NO ADDITIONAL INFORMATION THAT BECAME KNOWN TO THE GOVERNMENT BETWEEN MAY 15TH AND MAY 29TH THAT THEY DID NOT HAVE AVAILABLE TO THEM ON MAY 15TH.

THEREFORE, THERE IS REALLY NO BASIS FOR BRINGING IN ADDITIONAL CHARGES, HAVE THE GOVERNMENT ADEQUATELY INFORM PEOPLE OF THEIR OBLIGATION TO APPEAR AND ENTER THEIR PLEAS AND ASSERT THEIR RIGHTS TO TRIAL.

I ALSO RECOMMEND THAT THIS IS NOT A SITUATION LIKE BORDENKIRCHER IN WHICH YOU ARE DEALING WITH A FULLY INFORMED DEFENDANT WHO KNOWS OF THEIR RIGHTS AND THE OPTIONS AVAILABLE TO THEM, WHICH IS THE SITUATION THAT BORDENKIRCHER ADDITIONALLY -- WHICH IN FACT THIS COURT HAS ADDRESSED

IN THE -- THE COURT'S INDULGENCE FOR A MOMENT.

IN THE CASE OF THE UNITED STATES V. VELSICOL CHEMICAL CORPORATION AT 498 F. SUPP. 1255, 1980, IN AN OPINION DRAFTED AND PREPARED BY HIS HONOR JUDGE PARKER, THAT COURT DISTINGUISHED THE BORDENKIRCHER SITUATION FROM THE BLACKRIDGE AND PERRY SITUATION WHERE YOU HAVE VINDICTIVE MOTIVATION FOR THE ASSERTION OF RIGHTS AND INDICATED THAT THE DISTINGUISHING FACTOR FOR THIS COURT IS WHETHER OR NOT YOU ARE WITHIN THE GIVE AND TAKE OF PLEA NEGOTIATION.

I AM PREPARED TO HAVE WITNESSES COME FORWARD AND TESTIFY THAT THE FIRST OPPORTUNITY THAT A PLEA NEGOTIATION WAS EVER MADE AVAILABLE WAS AT THE END OF JUNE, SOME 60 DAYS AFTER THE PEOPLE WERE ARRESTED WHERE THEY FIRST FOUND OUT ABOUT THE ADDITIONAL CHARGE AND THERE WAS NO GIVE AND TAKE PLEA NEGOTIATION AT ALL WITHIN THAT INITIAL 60 DAYS AND THERE WAS NO GIVE AND TAKE.

THE PLEA BARGAIN SITUATION IS A SITUATION WHERE YOU HAVE A FULLY INFORMED DEFENDANT WHO IS ADVISED OF THE VARIOUS CONSEQUENCES AVAILABLE TO THEM. THEY ARE ADVISED OF THE VARIOUS COURSES OF ACTION OPEN TO THE GOVERNMENT AND THAT THEY ARE IN A POSITION TO EITHER ASSERT THEIR RIGHTS KNOWING WHAT THOSE CONSEQUENCES WOULD BE, AND THIS IS NOT A SITUATION WHERE THERE HAS BEEN A GIVE AND TAKE OF A PLEA NEGOTIATION PROCESS.

IN FACT, THE CONVERSATION BETWEEN THE COUNSEL,

THE PRO SE DEFENDANTS AND THE UNITED STATES ATTORNEY COULD HARDLY BE CHARACTERIZED AS A PLEA NEGOTIATION PROCESS WITH A GIVE AND TAKE AVAILABLE.

IN THE ABSENCE OF THAT SITUATION, WE COULD NOT APPLY EITHER THE GOODWIN OR THE BORDENKIRCHER ANALYSIS WHICH FOCUSES ON A FULLY INFORMED DEFENDANT.

THERE IS NO FULLY INFORMED DEFENDANT. THERE ARE DEFENDANTS WHO ARE PREPARED TO TESTIFY THAT THEY HAVE NEVER BEEN INFORMED THAT THE OPPORTUNITY TO POST $50 COLLATERAL INITIALLY WAS AN OPTION THAT IS STILL AVAILABLE.

THERE WERE REPRESENTATIONS TO THE CONTRARY AND THE GOVERNMENT'S RESPONSES DO NOT ADEQUATELY REPRESENT WHAT THE DEFENDANTS KNEW AT THE TIME THAT THEY WERE ARRAIGNED AND WHAT THEIR OPTIONS WERE.

IF YOUR HONOR WISHES TO HEAR TESTIMONY AND TO TAKE EVIDENCE TO THAT ISSUE, I AM PREPARED TO PROCEED BUT THERE IS NO PROSECUTORIAL MERIT TO BRING THE ADDITIONAL CHARGE.

THERE IS NO INFORMATION THAT CAME TO LIGHT THROUGHOUT THE PLEA NEGOTIATION PROCESS THAT THE GOVERNMENT DID NOT HAVE AVAILABLE AT THAT POINT.

THAT INFORMATION, AND I ASKED FOR A BILL OF PARTICULARS WHICH THIS COURT DENIED, AND THEREFORE THERE WAS NO REASON FOR THAT INFORMATION TO BE GIVEN TO ME AND THERE WERE NO ADDITIONAL CHARGES BROUGHT BASED ON THAT.

THE ADDITIONAL COUNT WAS LODGED SOLELY AFTER PEOPLE ELECTED THEIR RIGHT TO RETURN TO THIS COURT TO EXERCISE THEIR RIGHTS TO A FAIR TRIAL, TO A FULL TRIAL, AND IN LIGHT OF THAT, THEY FOUND THEMSELVES FACING SIGNIFICANTLY MORE SERIOUS CHARGES THAT THEY HAD NOT BEEN ARRESTED ON INITIALLY WHICH CHARGES WERE LODGED WELL AFTER THE 30 DAYS FROM THE BASIS OF THE INITIAL ARREST.

THANK YOU, YOUR HONOR.

THE COURT: MR. MC DANIEL?

MR. MC DANIEL: VERY BRIEFLY, YOUR HONOR.

YOUR HONOR, I WOULD SUGGEST TO THE COURT THAT THE DEFENDANTS' POSITION FITS VERY NEATLY INTO THE BORDENKIRCHER V. HAYES CASE WHERE THE COURT STATED THAT THE PROSECUTOR'S COURSE OF CONDUCT WHICH OPENLY PRESENTED TO THE DEFENDANTS THE ALTERNATIVES BETWEEN DISPOSING OF THE CASE AND FOREGOING TRIAL OR FACING MORE SERIOUS CHARGES WERE NOT VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT.

HERE, EVEN UP TO TODAY, IT IS THE GOVERNMENT'S POSITION THAT THE DEFENDANTS MAY EITHER FOREGO TRIAL AND FORFEIT THE $50 COLLATERAL OR FACE CHARGES UPON WHICH THEY ARE PLAINLY SUBJECT TO PROSECUTION.

BASED UPON THAT, THE GOVERNMENT SUGGESTS THAT ITS CONDUCT IN THIS CASE WAS ENTIRELY APPROPRIATE.

THE COURT: THE QUESTION IS NOT WHETHER THEY

CAN FORFEIT.

LET ME BACK UP. THEY WERE ARRESTED AND CHARGED WITH A VIOLATION WHICH AT THAT TIME PERMITTED THEM TO FORFEIT OR GO TO TRIAL ON THAT VIOLATION. ISN'T THAT CORRECT?

MR. MC DANIEL: THAT IS CORRECT, YOUR HONOR.

THE COURT: THE PROBLEM ARISES WHEN THOSE WHO CHOSE NOT TO FORFEIT AND SAID THAT THEY WANTED TO GO TO TRIAL, WERE NOT GOING TO BE BROUGHT TO TRIAL ON THE VIOLATION ON THE BASIS OF THE FORFEITURE. THEY WERE GOING TO BE BROUGHT TO TRIAL ON TWO SEPARATE OFFENSES, NOT ONE, BUT TWO, AND THEY FACED AT THAT POINT NOT A SIMPLE PENALTY FOR A RELATIVELY MINOR DISMEANOR BUT THEY FACED THE PROSPECT OF INCARCERATION UP TO A YEAR AND A $1,000 FINE.

IN THE SEQUENCE OF EVENTS, IT IS OBVIOUS THAT THE ONLY REASON THAT THE TWO COUNTS CAME OUT AS THEY DID WAS THAT THEY HAD ELECTED TO GO TO TRIAL, NOT TO GO TO TRIAL FOR WHICH THEY WERE ARRESTED BUT TO GO TO TRIAL ON SOMETHING ELSE.

I THINK THAT GIVES THE GOVERNMENT A PROBLEM.

IF IT IS NOT VINDICTIVE, WHAT ELSE IS IT WHEN THE CIRCUMSTANCES THAT GAVE RISE TO THE ORIGINAL ARREST HAVE NOT CHANGED ONE IOTA DESPITE ALL THE GOVERNMENT'S EVIDENCE.

IT DOES NOT FIT INTO THE PATTERN OF THOSE CASES THAT YOU CITE IN WHICH AT THE INITIAL ARREST, WHICH HAPPENS

VERY FREQUENTLY, AS A ROUTINE MATTER OF COURSE THE POLICE OFFICER ARRESTS FOR "X" BECAUSE THIS IS WHAT HE SEES AND THEN IN THE COURSE OF THE INVESTIGATION THEY DISCOVER "Y" AND "Z", TAKE IT TO A GRAND JURY AND GET AN INDICTMENT AND CHARGE HIM ON ALL OF THEM.

THAT IS NOT WHAT WE HAVE HERE.

WE HAVE A SITUATION HERE WHERE THEY ARE ORIGINALLY ARRESTED WITHOUT ANY ADDITIONAL CHANGE IN THE FACTUAL CIRCUMSTANCES AND THEN IT SUDDENLY BECOMES SOMETHING ENTIRELY DIFFERENT WHEN THEY EXERCISE THEIR RIGHT TO TRIAL.

THEY HAD A RIGHT TO TRIAL ON THE ORIGINAL ARREST. THAT IS WHAT THEY HAD A RIGHT TO TRIAL ON IF THEY WANTED IT OR TO FORFEIT THE $50 AND GO ABOUT THEIR BUSINESS.

THEY SAID, NO, WE WANT TO CARRY ON THIS PROTEST THROUGH THE LEGAL PROCESS WHICH THEY ARE ENTITLED TO DO.

SOME WANTED TO BE PRO SE AND SOME HIRED A LAWYER AND WHEN THEY DID THAT, WHAT DO THEY FIND OUT? THE WHOLE BALLGAME IS CHANGED AND AGAIN, NOT BECAUSE THERE WAS A SINGLE DISTINGUISHING FACTOR BETWEEN WHAT HAPPENED UP THERE AT THE WHITE HOUSE ON THE DAY IN QUESTION, NOT AN ADDITIONAL THING. THEY ARE NOT CHARGED WITH ADDITIONAL ASSAULTS OR ANYTHING ELSE. THAT IS THE PROBLEM.

AT BOTTOM, YOU SEE, WHAT MAKES THIS CASE DIFFERENT FROM SOME OF THESE OTHERS, MOST OF THOSE THAT YOU CITE, IT ARISES OUT OF, UNQUESTIONABLY, THE EXERCISE OF THEIR

FIRST AMENDMENT RIGHTS.

NOW, THAT DOES NOT GIVE THEM CARTE BLANCHE TO DO ANYTHING THEY WANT TO DO. THERE IS NO QUESTION ABOUT THAT AND THEY KNOW THAT AND THEY KNOW I KNOW IT. IT DOES NOT GIVE THEM CARTE BLANCHE BUT IT DOES NOT DEPRIVE THEM OF THEIR RIGHTS EITHER.

MR. MC DANIEL: MAY I BE HEARD, YOUR HONOR?

THE COURT: OH, WE HAVE PLENTY OF TIME. I WILL HEAR YOU AD NAUSEAM, I GUESS.

MR. MC DANIEL: YOUR HONOR, IN THE GOODWIN CASE, THE DEFENDANT WAS ARRESTED FOR A SERIES OF MISDEMEANORS AND TRAFFIC OFFENSES ON THE BALTIMORE-WASHINGTON PARKWAY.

HE WAS THEN PRESENTED TO THE UNITED STATES MAGISTRATE IN HYATTSVILLE WHERE HE FACED TRIAL ON A SERIES OF MISDEMEANOR CHARGES, AND THE MAXIMUM EXPOSURE WHICH WAS SOME SIX MONTHS.

HE DECLINED TO ENTER INTO A PLEA. HE DECLINED TO PLEAD OUT TO THOSE MISDEMEANORS JUST AS THE DEFENDANTS IN THIS CASE DECLINED TO PAY THE $50.

AS A RESULT THE CASE WAS REASSIGNED TO A DIFFERENT PROSECUTOR AND A FELONY INDICTMENT WAS RENDERED UPON WHICH THE DEFENDANT WAS ULTIMATELY --

THE COURT: WHAT WAS THE FELONY INDICTMENT?

MR. MC DANIEL: THE FELONY INDICTMENT WAS BASED UPON PRECISELY THE SAME FACTS AND PRECISELY THE SAME

OFFENSES THAT OCCURRED ON THE BALTIMORE-WASHINGTON PARKWAY ON THE NIGHT THAT GAVE RISE TO THE ORIGINAL MISDEMEANOR WARRANT, BUT INSTEAD OF A MISDEMEANOR CHARGE OF SIMPLY ASSAULT AND A MISDEMEANOR CHARGE OF FLEEING ARREST, THE CHARGES WERE INSTEAD, ASSAULTING A FEDERAL OFFICER, A FELONY AND OTHER FELONY CHARGES.

THEY WERE THE SAME FACTS, THE SAME CHARGES BUT THEY WERE SIMPLY CHARGED AS MORE GRAVE OFFENSES.

IN GOODWIN, AS THE COURT KNOWS, IT WAS THE TIMING THAT WAS CRITICAL. IT WAS NOT AN EFFORT BY THE UNITED STATES TO PENALIZE THE INDIVIDUAL BECAUSE HE HAD EXERCISED A PROCEDURAL RIGHT SUCH AS AN APPEAL. IT WAS SIMPLY A PRETRIAL PLEA BARGAINING SORT OF EXCHANGE BETWEEN THE PARTIES WHERE THE DEFENDANT WAS GIVEN THE OPTION OF GOING AHEAD AND DISPOSING OF THE CASES ON MINOR MISDEMEANOR GROUNDS OR OF DEMANDING HIS RIGHTS AND IT WAS HIS RIGHT TO TRIAL BEFORE A UNITED STATES DISTRICT JUDGE, FACING MORE SERIOUS POTENTIAL PENALTIES.

BECAUSE OF THE PRETRIAL NATURE OF THAT PARTICULAR CASE, THE COURT FOUND THAT THERE WAS NO PRESUMPTION OF VINDICTIVENESS THAT COULD LIE GIVEN THOSE FACTS; THAT WAS, ACCORDING TO THE COURT'S REASONING, LARGELY BASED ON THE IMPORTANCE OF THE PLEA BARGAIN TOOL IN THE ADMINISTRATION OF JUSTICE.

I WOULD SUBMIT TO THE COURT THAT THERE UNDER

THESE FACTS, WE HAVE A MINOR PETTY OFFENSE THAT CAN BE DISPOSED OF BY ANY DEFENDANT, EVEN UP TO TODAY, BY SIMPLY FORFEITING A $50 COLLATERAL, AND THOSE WHO ELECT TO EXERCISE THE RIGHT TO TRIAL, WHICH THEY UNQUESTIONABLY HAVE, THEN ARE FACING UP TO SIX MONTHS IN PRISON AND THAT IS ANALOGOUS, ALTHOUGH LESS SERIOUS, LESS SEVERE, THAN THE SITUATION IN GOODWIN BUT VERY, VERY EASILY COMPARED.

THE MINOR OFFENSE, THE $50 FORFEITURE OF COLLATERAL REPRESENTS MR. GOODWIN'S MISDEMEANOR CONVICTION POSSIBILITIES AND THIS MORE SERIOUS PETTY OFFENSE THAT IS BEFORE THE COURT TODAY IS EASILY ANALOGIZED TO THE FELONY INDICTMENT THAT WAS ULTIMATELY RETURNED AGAINST MR. GOODWIN AND UPON WHICH HE WAS ULTIMATELY FOUND GUILTY.

IT WAS BECAUSE OF THE PRETRIAL BEHAVIOR OF THE GOVERNMENT AND THE NECESSITY FOR WIDE PROSECUTORIAL LATITUDE THAT THE COURT ENDORSED THE BEHAVIOR OF THE UNITED STATES IN THE GOODWIN CASE AND IT WAS NOT SO MUCH AN EXERCISE OF FIRST AMENDMENT RIGHTS BUT AN EXERCISE OF PROCEDURAL RIGHTS AND I SUGGEST TO THE COURT THAT ALTHOUGH THE DEFENDANTS BEFORE THE COURT DO HAVE A RIGHT TO EXERCISE HERE IN THE COURT, THAT THEY DO NOT HAVE FIRST AMENDMENT RIGHTS THAT ENTITLE THEM TO BREAK PARTICULAR STATUTES OR TO VIOLATE FEDERAL REGULATIONS.

THE COURT: NO, I DID NOT SUGGEST THAT.

I WAS SUGGESTING THAT WE START FROM A DIFFERENT

PREMISE.

WE STARTED FROM A PREMISE WHERE THERE IS GREAT SENSITIVITY AS FAR AS THE COURTS ARE CONCERNED. WE DON'T TALK ABOUT SOMEBODY DRIVING DOWN THE HIGHWAY AND DOING RIDICULOUS THINGS. THERE IS NO CONSTITUTIONAL RIGHT TO DRIVE.

MR. MC DANIEL: YES, YOUR HONOR.

THE COURT: YOUR GOODWIN DEFENDANT WAS NOT EXERCISING ANY BASIC CONSTITUTIONAL RIGHT.

MR. MC DANIEL: THAT IS TRUE, YOUR HONOR. THE CONSTITUTIONAL ELEMENT OF THIS CASE, BECAUSE OF THE RELATIVE INSEVERITY OF THE OFFENSE, I BELIEVE THE COURT SHOULD OVERLOOK FOR THE PURPOSE OF THIS PARTICULAR MOTION.

THE COURT: NO, THAT SUGGESTS THAT THE MORE HELL YOU RAISE, THE MORE VALUABLE YOUR CONSTITUTIONAL RIGHT IS.

MR. MC DANIEL: YOUR HONOR, THE INITIAL OFFENSE AROSE OUT OF THE CLAIMED EXERCISE OF CONSTITUTIONAL RIGHT AND THE RELATIONSHIP BETWEEN THE $50 FORFEITURE AND THIS PARTICULAR PETTY OFFENSE MISDEMEANOR TO THE CONSTITUTIONAL RIGHT ARE IN FACT THE SAME, BUT PROCEDURALLY WITH RESPECT TO THE GOVERNMENT'S DECISION, I SUGGEST TO THE COURT THAT IT FITS VERY, VERY TIGHTLY INTO GOODWIN AND THAT BASED UPON GOODWIN AND THE COURT'S ENCOURAGEMENT THERE FOR THE VALUE OF THE PLEA BARGAINING, THAT THE GOVERNMENT'S BEHAVIOR WAS ENTIRELY APPROPRIATE.

THE COURT: SO YOU SAY THAT THERE CAN BE A PLEA BARGAINING BUT THE OTHER SIDE DOESN'T KNOW THAT THE PLEA EXISTS?

MR. MC DANIEL: NO, YOUR HONOR, THAT IS NOT WHAT I AM SAYING.

FROM THE EARLIEST MEETINGS THAT THE UNITED STATES ENGAGED IN WITH MR. ELLENBOGEN, THERE HAS ALWAYS BEEN A PLEA AGREEMENT. THE PLEA AGREEMENT REMAINS OPEN TODAY. THE BARGAIN IS AVAILABLE.

THE DEFENDANTS WHO WISH NOT TO FORFEIT COLLATERAL ARE ENTIRELY FREE TO GO AHEAD WITH THE CASE BUT THOSE WHO EVEN TODAY DESIRE TO FORFEIT COLLATERAL AND TO HAVE THE OUTSTANDING INFORMATION DISMISSED AGAINST THEM, ARE ENTIRELY WELCOME TO THAT OPTION.

WE HAVE ALWAYS BEEN AVAILABLE FOR NEGOTIATION. IT IS SOMETHING THAT IS ENCOURAGED ROUTINELY IN THE UNITED STATES ATTORNEY'S OFFICE.

WE REMAIN OPEN TO THAT OR ANY OTHER REASONABLE ALTERNATIVES THAT THE DEFENSE MIGHT BE WILLING TO PROPOSE.

THE COURT: MR. ELLENBOGEN WISHES TO BE HEARD AGAIN.

MR. ELLENBOGEN: THANK YOU, YOUR HONOR.

IN RESPONSE TO THE GOVERNMENT'S ARGUMENT IN TERMS OF BORDENKIRCHER -- EXCUSE ME. NOT BORDENKIRCHER BUT GOODWIN, I WOULD LIKE TO POINT OUT THAT IN THE COURSE OF THE GOODWIN

FACTUAL SETTING, GOODWIN HAD FAILED TO APPEAR AT ONE POINT AND SO THERE WAS A FACTUAL CHANGE DURING THE COURSE OF THAT INVESTIGATION, IN THE COURSE OF THAT PLEA NEGOTIATION, THAT DID GIVE THE GOVERNMENT IN THAT CASE THE LEGITIMATE RIGHT TO GO AHEAD AND REEVALUATE ITS CASE.

THERE HAS BEEN NO SUCH FACTUAL CHANGE IN THIS CASE.

I WOULD ALSO REPRESENT THAT THE FIRST TIME A PLEA NEGOTIATION WAS MADE AVAILABLE TO MYSELF AND TO THE DEFENDANTS WAS AT THE JUNE 21ST ARRAIGNMENT WHICH WAS SOME TWO MONTHS AFTER THE PEOPLE HAD BEEN ARRESTED AND AFTER A SECOND SERIES OF CHARGES HAD BEEN BROUGHT, AFTER THE GOVERNMENT HAD SIGNIFICANTLY UPPED THE ANTE, AND WHICH MR. MC DANIEL WELL ACKNOWLEDGED, ONCE AN OPTION WAS MADE AVAILABLE TO PEOPLE, THERE WERE DEFENDANTS WHO DID TAKE ADVANTAGE OF THAT OPTION.

THIS IS THE FIRST THAT I OR ANY DEFENDANTS HAVE EVER HEARD THAT WE STILL HAD THE OPTION OR SOME HAD THE OPTION OR THAT ANYONE COULD HAVE PAID THE $50 INITIAL COLLATERAL.

THE COURT: I DON'T THINK AT THIS STAGE IT MAKES ANY DIFFERENCE FOR YOUR CLIENTS OR FOR THE PRO SE DEFENDANTS BECAUSE THEY DON'T INTEND EITHER WAY.

MR. ELLENBOGEN: THE PROPER FOCUS IS NOT THAT THE GOVERNMENT'S REPRESENTATIONS ON THE 12TH HOUR, ON THE

VERGE OF TRIAL, AND THE PROPER FOCUS OF THE INQUIRY IS THEIR DECISION TO INITIATE THE CHARGES IN THE FIRST PLACE AND I WOULD SUBMIT FOCUSING THE COURT'S ATTENTION ON THAT, THE GOVERNMENT HAS NOT ESTABLISHED THAT THIS IS NOT A VINDICTIVE PROSECUTION.

THE COURT: THE GOVERNMENT DOES NOT HAVE THE BURDEN.

MR. ELLENBOGEN: YOUR HONOR, I WOULD RESPECTFULLY DISAGREE AND SAY THAT ONCE THE DEFENDANT HAS ESTABLISHED A REASON TO BELIEVE THAT THERE WAS AN IMPROPER MOTIVATION, THE BURDEN SHIFTS TO THE GOVERNMENT TO ESTABLISH THAT THERE IS NO VINDICTIVENESS AND I REFER THE COURT TO THE UNITED STATES V. VELSICOL.

THE COURT: YES, BUT YOU ARE ASSUMING A PREMISE THAT YOU HAVE ESTABLISHED. THE GOVERNMENT HAS TO RESPOND TO IT.

MR. ELLENBOGEN: I UNDERSTAND THAT THE GOVERNMENT HAS TO RESPOND BUT I DON'T THINK THAT THEIR RESPONSE HAS ADEQUATELY ESTABLISHED A PROPER PROSECUTORIAL MOTIVATION IN BRINGING THE SECOND CHARGES.

THE FOCUS OF OUR INQUIRY AT THIS POINT IS NOT WHAT IS HAPPENING TODAY, NOT THE POSTURE OF THIS CASE AT THIS POINT, BUT THE POSTURE OF THE CASE AT THE TIME THE GOVERNMENT FILED THE CHARGES AND UPPED THE ANTE FOR PEOPLE WHO HAD EXERCISED THEIR RIGHT TO TRIAL.

I SUBMIT ON THAT BASIS AND ON THE BASIS OF THE RECORD IN THIS CASE, THAT THERE IS A VINDICTIVE MOTIVATION FOR THIS PROSECUTION AND THAT REFERENCE TO GOODWIN MADE BY THE GOVERNMENT HAS TO BE SUSPECT BECAUSE ON THE BASIS OF THE FACTS IN GOODWIN, THERE WERE FACTS THAT CHANGED IN THE COURSE OF GOODWIN GIVING A LEGITIMATE BASIS FOR THE GOVERNMENT IN GOODWIN TO REEVALUATE ITS CASE.

HERE, THERE HAS BEEN NO CHANGE AND THERE IS NO PROPER PROSECUTORIAL MOTIVATION.

THE GOVERNMENT IS NOT ALLEGING DIFFERENT CHARGES. THIS SITUATION IS MORE ANALOGOUS TO THE CASE OF THE UNITED STATES V. SCHILLER WHERE THE COURT SAID THAT IT WASN'T VINDICTIVE BECAUSE BY REINDICTING PEOPLE AND ADDING CHARGES THE GOVERNMENT WAS THEREFORE IN A POSITION TO BRING CHARGES IT LEGALLY COULD NOT OTHERWISE BRING UNDER THE INITIAL INDICTMENT. AND THAT WAS A LEGITIMATE PROSECUTORIAL MOTIVE.

BUT HERE THERE ARE NO ADDITIONAL CHARGES THAT THE GOVERNMENT IS BRINGING THAT IT COULD NOT HAVE BROUGHT INITIALLY.

THERE IS NOTHING GIVING RISE TO IT. THERE HAS BEEN NO FURTHER INVESTIGATION GIVING RISE TO ADDITIONAL FACTS GIVING RISE TO ADDITIONAL CRIMES.

I WILL SAY THAT THERE HAS BEEN NO LEGITIMATE EXPLANATION FOR THE CONDUCT IN BRINGING THE TWO CHARGES THAT HAS EVER BEEN PROFFERED TO ME AND I SUBMIT THAT NO

SUCH EXPLANATION HAS BEEN PROFFERED TO THE COURT AND THAT IT WAS SOLELY BY VIRTUE OF THE FACT THAT AFTER THE GOVERNMENT WAS INFORMED THAT THE PEOPLE WERE GOING TO EXERCISE THEIR RIGHT TO TRIAL TO CHALLENGE THE CHARGES, THAT THE GOVERNMENT DECIDED TO REEVALUATE ITS CASE AND TO BRING A SECOND COUNT TO FURTHER COERCE AND INTIMIDATE PEOPLE INTO ACCEPTING THE $50 OPTION.

A NUMBER OF PEOPLE DID THAT. A NUMBER OF $50 CITATIONS HAVE BEEN PAID AND A NUMBER OF PEOPLE HAVE HAD THEIR CASE TRANSFERRED BECAUSE OF THE THREAT, THE PROSECUTION OF A POSSIBLE YEAR IN JAIL.

BUT TO CHARACTERIZE THIS AS A PLEA NEGOTIATION PROCESS IS BEING A BIT DISINGENUOUS. THERE HAS BEEN NO REAL GIVE AND TAKE FROM APRIL 22ND -- FROM MAY 15TH WHEN WE INITIALLY GOT TOGETHER AND THE END OF JUNE WHEN THE GOVERNMENT FOR THE FIRST TIME MADE A PLEA OFFER AVAILABLE.

ONCE THAT OFFER WAS MADE AVAILABLE, THERE WERE A NUMBER OF PEOPLE THAT DID TAKE THAT OFFER UP.

IT WAS NOT UNTIL THE GOVERNMENT RESPONDED TO MY MOTION THAT IT WAS BROUGHT TO MY ATTENTION THAT THE GOVERNMENT WAS STILL GOING TO ALLOW PEOPLE TO PAY THE $50 COLLATERAL.

I SUBMIT THAT THERE IS NO PROPER MOTIVATION FOR BRINGING THIS PROSECUTION AT THIS STAGE OF THE GAME AND THE REMAINING COUNT IN THE INFORMATION SHOULD BE DISMISSED.

THANK YOU, YOUR HONOR.

THE COURT: DO YOU WISH TO BE HEARD AGAIN?

MR. MC DANIEL: NO, I WILL SUBMIT.

MS. WASHINGTON: MAY I APPROACH THE BENCH, YOUR HONOR?

THE COURT: IDENTIFY YOURSELF.

MS. WASHINGTON: MY NAME IS MINDY WASHINGTON, A PRO SE DEFENDANT.

I WOULD LIKE TO SAY THAT THE PRO SE DEFENDANTS WOULD LIKE TO ADDRESS THIS ARGUMENT AND THERE ARE DEFENDANTS PREPARED TO GIVE TESTIMONY ON IT AND I WANT TO MAKE IT CLEAR THE PRO SE DEFENDANTS ARE INTERESTED IN IT.

THE COURT: ALL RIGHT.

HAVE YOU TALKED WITH THEM AS A GROUP, THE PRO SE DEFENDANTS.

MS. WASHINGTON: YES.

THE COURT: WHY DON'T YOU MAKE A REPRESENTATION AS TO WHAT YOUR CONTENTION AND THEIRS IS AND THEN WE WILL SEE WHETHER WE HAVE TO PUT THEM UNDER OATH.

I WILL ACCEPT YOUR REPRESENTATION AS TO WHAT YOUR POSITION IS AND WE CAN EXPLORE IT PRELIMINARILY TO SEE WHAT YOUR CONTENTION IS.

MS. WASHINGTON: OK. COULD I HAVE THE COURT'S INDULGENCE?

THE COURT: SURELY.

IT MIGHT BE MORE HELPFUL TO YOU SO YOU HAVE THE OPPORTUNITY TO DISCUSS THIS AS A GROUP IF I TAKE A FEW MINUTES RECESS.

WOULD THAT HELPFUL TO YOU SO YOU CAN THINK THROUGH WHAT IT IS YOU WANT TO SAY IN A FASHION THAT I CAN UNDERSTAND AND THE GOVERNMENT CAN UNDERSTAND.

MS. WASHINGTON: YES.

THE COURT: DO YOU THINK TEN MINUTES WOULD BE SUFFICIENT?

MS. WASHINGTON: YES.

THE COURT: DO THAT AND THEN I WILL COME BACK.

(WHEREUPON, A SHORT RECESS WAS TAKEN.)

AFTER RECESS

THE COURT: YES, MA'AM.

MS. WASHINGTON: THE PRO SE DEFENDANTS HAVE DISCUSSED THIS DURING THE RECESS AND WE THINK IT IS IMPORTANT FOR THE COURT TO HEAR PEOPLE SPEAK ON THIS ARGUMENT, TO HEAR TESTIMONY BEFORE RULING ON THE VINDICTIVE PROSECUTION.

THE PRO SE DEFENDANTS AGREE WITH MR. ELLENBOGEN AND THEY WISH TO SUPPLEMENT THAT WITH THEIR TESTIMONY.

THE COURT: WHAT KIND OF TESTIMONY, TESTIMONY ABOUT WHAT, ON WHAT ISSUE?

MS. WASHINGTON: ON THE ISSUES OF THE THREAT OF INCARCERATION, ON DUE PROCESS AND THEY ARE WILLING AND WOULD LIKE TO PROFFER EVIDENCE ON THAT, AND I BELIEVE ANOTHER

PRO SE DEFENDANT WOULD LIKE TO ADDRESS THE BENCH AS WELL FOR THAT.

THE COURT: ALL RIGHT.

MS. HEARN: I AM JUDITH HEARN, ONE OF THE --

THE COURT: I AM SORRY. YOU WILL HAVE TO SPEAK UP.

MS. HEARN: I AM JUDITH HEARN, ONE OF THE PRO SE DEFENDANTS.

THE COURT: YES, MS. HEARN.

MS HEARN: I -- PARTLY THIS IS TO REITERATE WHAT YOU SAID FIRST.

THE PROSECUTION SEEMS TO CLAIM THAT -- OR I BELIEVE IT IS THE CLAIM THAT IN THE ANALOGOUS CASE, THE GOODWIN CASE, THAT GOODWIN HAD REFUSED TO ENTER A PLEA AND THAT IT WAS ON THAT BASIS THAT THE CASE WAS THEN REASSIGNED AND THEN ON THE REASSIGNMENT, THEY ADDED CHARGES.

I WANTED TO POINT OUT THAT WE WERE ESSENTIALLY NOT GIVEN A CHANCE TO ENTER A PLEA BECAUSE WE WERE NOT ACQUITTED -- NOT ACQUITTED, BUT AT ARRAIGNMENT WE WERE NOT GIVEN A CHANCE, AND AT THAT POINT WE WERE IN JAIL WE WERE NOT GIVEN A CHANCE TO -- THE OTHER PEOPLE WHO WERE ARRESTED AND WE WERE ONLY GIVEN A CHANCE AT ARRAIGNMENT IN JUNE WHEN THEY BROUGHT THE ADDITIONAL CHARGES AND THE SECOND THING, I BELIEVE YOU SAID THIS, YOUR HONOR, ALREADY, BUT I WANT TO REITERATE IT FROM THE POINT OF VIEW OF THE DEFENDANTS.

IT SEEMS TO ME THAT THE PROSECUTION IS SAYING THAT IF WE -- ON THE ONE HAND, IF WE HAD POSTED COLLATERAL WHICH IS MORE OR LESS EQUIVALENT TO A GUILTY PLEA --

THE COURT: NO, IT IS FORFEITURE THAT IS GUILTY BUT NOT JUST POSTING IT.

YOU CAN POST COLLATERAL AND THEN COME TO TRIAL.

MS. HEARN: OK. I DON'T THINK THAT WAS EVER EXPLAINED TO US AND IT WAS MORE OR LESS EXPLAINED TO US THAT IT WAS LIKE A PARKING TICKET.

THE COURT: WHEN YOU GET A PARKING TICKET, YOU CAN PAY THE TICKET AND ASK TO HAVE IT CONTESTED AND YOU GO TO A HEARING AND THE HEARING OFFICER WILL DETERMINE WHETHER YOU ARE ENTITLED TO GET YOUR MONEY BACK. THAT IS THE SAME AS WITH COLLATERAL.

MS. HEARN: OK. BUT WITH MY UNDERSTANDING OF IT, IT SEEMS TO ME LIKE IT IS A RATHER CIRCULAR ARGUMENT BECAUSE WE COULD EITHER POST COLLATERAL OR MORE OR LESS -- I GUESS IT IS A QUESTION OF UNDERSTANDING. IT WAS NOT EXPLAINED TO ME WHAT THE OPTIONS WOULD BE. IT SEEMED TO BE A PLEA AND THAT SEEMED LIKE DOUBLE JEOPARDY.

IT SEEMED LIKE WE WOULD HAVE NO CONSTITUTIONAL RIGHTS. THANK YOU.

MS. HAND: MY NAME IS JUDITH HAND. I AM A PRO SE DEFENDANT.

I WOULD LIKE TO ADDRESS MR. MC DANIEL'S CLAIM

THAT A PLEA BARGAIN WAS AVAILABLE TO ALL DEFENDANTS AT ALL TIMES.

I WAS IN THE FIRST GROUP OF PEOPLE TO BE ARRAIGNED ON THE 29TH OF MAY AND NO PLEA BARGAIN WAS OFFERED TO US AT THAT TIME.

I RETURNED WITH SOME OF THE OTHER PEOPLE THAT WERE ARRAIGNED ON THE SECOND ARRAIGNMENT DATE AND THEN BECAME AWARE THAT THEY HAD BEEN OFFERED -- THAT IF THEY PLED GUILTY OR NOLO, THEY WOULD RECEIVE PROBATION OR TIME SERVED DEPENDING UPON WHETHER THEY HAD SPENT TIME IN JAIL, AND THAT WAS NEVER OFFERED TO US IN THE FIRST GROUP OF PEOPLE TO BE ARRAIGNED.

ALSO, WE WERE NOT TOLD OF THE SECOND CHARGE. WE WERE NOT GIVEN THAT INFORMATION OR READ THAT INFORMATION UNTIL AFTER WE HAD ALREADY PLED TO BOTH CHARGES WHICH WE DIDN'T KNOW WAS BOTH CHARGES AT THAT TIME.

WE THOUGHT WE WERE JUST PLEADING TO DEMONSTRATING WITHOUT A PERMIT OR AT LEAST THAT WAS MY UNDERSTANDING.

ALSO MR. MC DANIEL'S CONTENTION THAT THE $50 FORFEITURE POSSIBILITY HAS BEEN AVAILABLE TO US THROUGHOUT THIS WHOLE PROCESS HAS NOT BEEN MADE CLEAR.

I WAS NOT AWARE OF THAT, NOT AWARE THAT I HAD THAT OPTION TO PAY $50 AND BE DONE WITH THIS WHOLE PROCESS.

IT WAS MY UNDERSTANDING AND I THINK THE UNDERSTANDING OF THE OTHERS, AND I OBVIOUSLY CAN'T SPEAK FOR

THEM, BUT THAT ONCE I ENTERED A NOT GUILTY PLEA, IF I CHOSE TO CHANGE THAT PLEA TO GUILTY OR NOLO, THAT MY SENTENCE WOULD BE AT THE DISCRETION OF THE COURT AND NOT THE FACT THAT I COULD PAY $50 AND THE WHOLE THING WOULD BE DONE AWAY WITH.

SO I THINK THAT HIS CONTENTION ABOUT THOSE ISSUES IS PATENTLY FALSE AND NOT ON ISSUES OF FACT.

THANK YOU.

MS. CHILDERS: MY NAME IS JO ELLEN CHILDERS. I AM ONE OF THE PRO SE DEFENDANTS AND IN FACT, I AM THE ONLY PRO SE DEFENDANT THAT LIVES IN THIS AREA, SO I HAVE MET WITH MR. MC DANIEL AND NO ONE ELSE IN THIS GROUP HAS.

THE PROFFER OF EVIDENCE, SHOULD I BE ABLE TO TESTIFY ON THE STAND, I WOULD BE THE PERSON WHO WOULD BE TESTIFYING TO THE FACT THAT MR. MC DANIEL DID INDEED THREATEN MYSELF AND THE OTHER PRO SE DEFENDANTS IN THE CASE IF WE WOULD NOT STIPULATE TO THE FACTS IN THE CASE AND I CAN ALSO --

THE COURT: THIS WAS AFTER THE TWO-COUNT INFORMATION WAS FILED? IS THAT CORRECT?

MS. CHILDERS: THIS IS WELL AFTER THAT.

THE COURT: WHAT CONTACT, IF ANY, DID YOU HAVE WITH THE PROSECUTOR PRIOR TO THE TIME OF THE TWO COUNTS?

MS. CHILDERS: PRIOR TO THE INFORMATION?

THE COURT: YES.

MS. CHILDERS: I WAS IN THE SECOND ARRAIGNMENT SO BY THE TIME I CAME INTO COURT --

THE COURT: YOU WERE ARRAIGNED ON WHAT?

MS. CHILDERS: I WAS ARRAIGNED ON THE TWO COUNTS AT THAT TIME.

THE COURT: YES, AND PRIOR TO THAT TIME, WHAT, IF ANY, CONVERSATIONS DO YOU ALLEGE YOU HAD WITH ANY MEMBER OF THE PROSECUTOR'S OFFICE?

MS. CHILDERS: I HAD NOT HAD ANY CONTACT WITH THE PROSECUTION WHATSOEVER PRIOR TO THAT TIME AND SO WHEN I AM TALKING ABOUT THE THREAT, I AM TALKING ABOUT SOMETHING THAT OCCURRED ON SEPTEMBER 3RD, WHICH WAS AT THE TIME WHEN I --

THE COURT: FOR OUR PURPOSES, THAT IS NOT THE CRUCIAL ISSUE.

MS. CHILDERS: OK.

THE COURT: IS THERE ANYTHING ELSE?

MS. CHILDERS: NO.

THE COURT: WHO AMONG THE DEFENDANTS, WHETHER YOU ARE REPRESENTED BY COUNSEL OR NOT, WHO AMONG THE DEFENDANTS HAVE HAD ANY CONVERSATION WITH ANY MEMBER OF THE PROSECUTION PRIOR TO THE TIME THAT YOU CAME TO ARRAIGNMENT ON THE INFORMATION CHARGING THE TWO COUNTS?

(NO RESPONSE.)

THE COURT: HAS ANY DEFENDANT HAD ANY INFORMATION OR ANY CONFERENCE WITH THE PROSECUTOR OR ANY REPRESENTATIONS

FROM THE PROSECUTOR DIRECTLY OR THROUGH COUNSEL?

MR. ELLENBOGEN?

MR. ELLENBOGEN: MAY IT PLEASE THE COURT --

THE COURT: PRIOR TO THE ARRAIGNMENT ON THE TWO-COUNT INFORMATION, I WANT TO KNOW IF ANY DEFENDANT HAS HAD ANY CONTACT WITH THE PROSECUTOR. THAT IS WHAT I WANT TO KNOW.

MR. ELLENBOGEN: PRIOR TO THE ARRAIGNMENT, YOUR HONOR, THE ONLY CONTACT THAT ANY DEFENDANT MAY HAVE HAD WAS A SMALL PERCENTAGE OF THE TOTAL NUMBER OF ARRESTEES WHO RECEIVED A NOTICE ON OR ABOUT THE 15TH OF MAY TO APPEAR IN COURT FOR A CHARGE OF DEMONSTRATING WITHOUT A PERMIT.

THE COURT: ALL RIGHT.

MR. MC DANIEL, WHAT IS THE GOVERNMENT'S REPRESENTATION WITH RESPECT TO WHAT WENT ON BETWEEN THE GOVERNMENT AND ANY DEFENDANT PRIOR TO THE TIME THAT ANY DEFENDANT APPEARED FOR ARRAIGNMENT ON THE TWO-COUNT INFORMATION?

MR. MC DANIEL: YOUR HONOR, NO ONE FROM THE STAFF OF THE UNITED STATES ATTORNEY SPOKE TO ANY INDIVIDUAL DEFENDANT PRIOR TO THE ARRAIGNMENT AND THE REASONS BEING, OF COURSE, DISCIPLINARY RULE 7104, THE POSSIBILITY THAT THEY MIGHT RETAIN COUNSEL.

HOWEVER, I CAN REPRESENT TO THE COURT THAT PRIOR TO THE SECOND TWO ARRAIGNMENTS IN THESE CASES --

THE COURT: OF ADDITIONAL DEFENDANTS?

MR. MC DANIEL: YES,YOUR HONOR, THAT I DID IN FACT ENGAGE IN DISCUSSIONS, AND IN SOMETHING RESEMBLING NEGOTIATIONS WITH MR. ELLENBOGEN BUT THERE IS ONLY ONE SINGLE DEFENDANT WITH WHOM I HAVE EVER SPOKEN PERSONALLY AND THAT IS MS. CHILDERS WHO RECENTLY ADDRESSED THE COURT AND THAT WAS FAR AFTER THE INFORMATION WAS FILED.

MR. ELLENBOGEN: YOUR HONOR, JUST TO CLARIFY THE RECORD FOR YOUR HONOR'S INFORMATION, THE FIRST CONTACT I HAD WITH THE GOVERNMENT REGARDING THIS CASE WAS WHEN I WAS INFORMED BY THE MAGISTRATE'S CLERK THAT PEOPLE WERE TO APPEAR ON MAY 15TH FOR ARRAIGNMENT AND AT THAT POINT I DID MEET WITH THE PROSECUTION, WITH MR. MC DANIEL, AND THERE WAS NO REFERENCE, NO MENTION WHATSOEVER, THAT AN ADDITIONAL COUNT WAS GOING TO BE BROUGHT AND YET I HAVE REPRESENTED TO MR. MC DANIEL AND TO VARIOUS MEMBERS OF THE PARK POLICE AND THE CLERK'S OFFICE AND THE MAGISTRATE'S OFFICE THAT PEOPLE ARE WILLING TO RETURN TO EXERCISE THEIR RIGHTS TO A TRIAL.

IT WAS AFTER THAT -- IT WAS TWO WEEKS AFTER THAT THAT THE FIRST INFORMATIONS WERE EVER DRAFTED OR FILED AND THAT WAS THE FIRST TIME THAT THE TWO COUNTS WERE EVER MADE KNOWN TO ANYONE.

THE COURT: IS THIS FACTUALLY ACCURATE? DO YOU WANT ME TO PUT PEOPLE ON THE STAND AND TAKE TESTIMONY UNDER OATH OR ARE THESE REPRESENTATIONS MADE ACCURATE?

MR. MC DANIEL: I AM SATISFIED WITH THE REPRESENTATIONS, YOUR HONOR.

MR. ELLENBOGEN: YOUR HONOR, WITH RESPECT TO THE NOTES THAT THE PEOPLE WERE SENT, I HAVE HERE A COPY OF THE LETTER THAT WAS SENT OUT FROM THE CLERK'S OFFICE PURSUANT TO OUR MEETING ON MAY 15TH, AND I WOULD LIKE TO RECITE FROM THE FIRST SENTENCE OF IT.

"THAT YOU ARE CITED BY THE PARK POLICE ON APRIL 22ND FOR THE ALLEGED VIOLATION OF 36 CFR 50.19, DEMONSTRATING WITHOUT A PERMIT."

THROUGHOUT THE LETTER THERE IS NO REFERENCE WHATSOEVER TO THE SECOND CHARGE.

THE COURT: THAT IS REALLY NOT THE ISSUE.

MR. ELLENBOGEN: THE ISSUE AS TO THE INFORMATION THAT PEOPLE HAD AT THE TIME THAT THEY WERE ARRESTED AND THE BRINGING OF THE CHARGES, AND I THINK THIS IS JUST A POINT OF INFORMATION.

THE COURT: IT IS MY VIEW THAT GOODWIN DOES NOT CONTROL THIS CASE ON THE FACTS THAT WE KNOW.

GOODWIN, AS LAWYERS KNOW WHO HAVE READ THE CASE, WAS A SITUATION IN WHICH THE MISDEMEANOR CHARGES WERE BROUGHT THERE WAS DISCUSSION AND THE PROSECUTOR SAID, LOOK, COP TO THESE PLEAS OR SOMETHING BIG AND BAD CAN HAPPEN TO YOU.

IN ESSENCE THAT IS WHAT HE WAS TOLD. THE DEFENDANT SAYS, NO.

THE PROSECUTOR SAID, FINE. HE GOT A GRAND JURY INDICTMENT, FELONIES ARISING OUT OF THE SAME BASIC INFORMATION, AND THE COURT OF APPEALS DIDN'T LIKE IT AND THE SUPREM COURT SAID, NO, THAT IS QUITE ALL RIGHT, BECAUSE IT WAS IN THE CONTEXT OF A GIVE AND TAKE BETWEEN THE PROSECUTOR AND THE DEFENDANT AND THE DEFENDANT HAD MADE HIS ELECTION KNOWING THAT HE FACED STIFFER CHARGES DOWN THE WAY, WHICH WAS HIS RIGHT TO DO NO MATTER WHAT THE PROSECUTOR THOUGHT ABOUT IT OR THE INCONVENIENCE THAT IT WAS GOING TO PUT TO THE GOVERNMENT.

THESE CASES ALL HAVE TO DEPEND UPON THE FACTS AND IT IS UNCONTRADICTED ON THIS RECORD THAT HAVING BEEN ARRESTED, EVERY ONE OF THESE DEFENDANTS KNEW EXACTLY WHAT HE WAS ARRESTED FOR.

THEY SHOW UP FOR AN ARRAIGNMENT AND HAVE TO RESPON TO AN INFORMATION INVOLVING TWO COUNTS.

THERE WAS NO NOTICE, FORMAL, INFORMAL, TO THE INDIVIDUAL PRO SE DEFENDANTS OR THROUGH COUNSEL THAT THE POSSIBILITY EXISTED THAT IF THEY DIDN'T POST THE COLLATERAL OR FORFEIT THE COLLATERAL, THEY WERE GOING TO BE SUBJECTED TO ADDITIONAL CHARGES WHETHER OR NOT THEY AROSE OUT OF THAT INCIDENT OR ANYTHING ELSE THAT THE GOVERNMENT CHOSE LEGITIMATELY TO BRING AGAINST THEM WHICH IS AN ENTIRELY DIFFERENT SITUATION.

THE INITIAL CHARGE, A PETTY MISDEMEANOR, THE

MINIMUM POSSIBILITY OF A FINE OR INCARCERATION SUDDENLY BLOSSOMS INTO THE POSS BILITY OF A $1,000 FINE AND A YEAR IN JAIL ABSOLUTELY OUT OF THE BLUE, SO TO SPEAK, WITH NO ADDITIONAL REASONS THAT COULD HAVE POSSIBLY BEEN CONJURED UP OR IN FACT WERE OFFERED BY THE GOVERNMENT, ALTHOUGH THE GOVERNMENT IS NOT OBLIGATED, NECESSARILY, TO TELL YOU ITS REASONS, BUT THERE HAS TO BE SOME BASIS FOR IT WHICH CHANGES THE SITUATION.

GOODWIN CLEARLY INDICATES TO THIS COURT THAT WHATEVER THE BASIS FOR THE CHANGE IN THE GOVERNMENT'S POSITION, SOME KNOWLEDGE AND INFORMATION HAS TO BE GIVEN TO AN INDIVIDUAL DEFENDANT SO THAT SHE OR HE CAN MAKE THE DETERMINATION OR ELECTION WHETHER THEY WANT TO FACE THE ADDITIONAL CHARGES.

NO SUCH OPPORTUNITY WAS EVER AFFORDED ANY ONE OF THE DEFENDANTS PRESENTLY CHARGED THROUGH COUNSEL, THROUGH NOTICE, OR ANYTHING ELSE. YOU ELECT NOT TO FORFEIT AND YOU TELL THE GOVERNMENT WE WANT TO GO TO TRIAL AND THE GOVERNMENT SAYS, FINE. WE ARE GOING TO ARRAIGN YOU BUT ON WHAT?

ON A TWO-COUNT INFORMATION AND THE FACT THAT THE GOVERNMENT CONTENDS, AND I DON'T DISPUTE THE GOVERNMENT'S CONTENTION BECAUSE THE OFFER HAS BEEN MADE IN OPEN COURT AND THE FACT THAT THE GOVERNMENT IS STILL WILLING FOR YOU TO FORFEIT THE $50 AND GO ABOUT YOUR BUSINESS DOESN'T CHANGE THE PICTURE ONE IOTA AS FAR AS THE LEGAL STATUS IN WHICH

THE GOVERNMENT FINDS ITSELF AND WHICH YOU FIND YOURSELVES.

TO THIS COURT, WHAT THE COURT OF APPEALS WILL THINK ABOUT IT, I DON'T KNOW, BUT TO THIS COURT IT'S A CLEAR INDICATION THAT IN THE EXERCISE OF YOUR RIGHT TO HAVE A JURY TRIAL, THE GOVERNMENT UPPED THE ANTE, AS FAR AS THE GOVERNMENT IS CONCERNED, WITH NO NOTICE, NO CONSULTATION, WITH NO OPPORTUNITY FOR YOU TO MAKE AN ELECTION.

I THINK THAT IS A VIOLATION OF YOUR DUE PROCESS RIGHTS AND I DISMISS THE INFORMATION AS TO ALL DEFENDANTS.

MR. ELLENBOGEN: THANK YOU, YOUR HONOR.

(WHEREUPON, THE HEARING WAS CONCLUDED.)

CERTIFICATE OF REPORTER

THIS RECORD IS CERTIFIED BY THE UNDERSIGNED TO BE THE OFFICIAL TRANSCRIPT OF THE ABOVE-ENTITLED HEARING.

OFFICIAL COURT REPORTER

CRIMINAL INCIDENT RECORD

PARK RANGER
JUVENILE

2 ORGANIZATION CODE: 3260 | 3 SYSTEM AREA: 1600 Pennsylvania Ave. NW, DC | 4 LOCATION CODE: 1001 | 5 YEAR: 85 | CASE/INCIDENT NUMBER: 015

6 LOCATION OF INCIDENT: West Executive Gate | BEAT: 821 | DAY: 22 | YR: 85 | 24 HOUR TIME: 12:00 | HRS | MIN | DAY OF WEEK: 04

7 OFFENSE/INCIDENT CODE | 12 NATURE OF INCIDENT: Demonstrating Without A Permit 36CFR50.19 | 13 WHEN RECEIVED DATE: 4-22-85 TIME: 1200

COMPLAINANT / WITNESS / VICTIM

14 LAST | FIRST | MI | C V W | 15 DATE OF BIRTH | 16 PHONE BUSINESS

17 ADDRESS NUMBER | STREET | CITY | STATE | ZIP | 18 PHONE RESIDENCE

19 LAST | FIRST | MI | C V W | 20 DATE OF BIRTH | 21 PHONE BUSINESS

22 ADDRESS NUMBER | STREET | CITY | STATE | ZIP | 23 PHONE RESIDENCE

ARRESTED / SUSPECT / OTHER

24 LAST: Tarver, Lisa (NMN) | FIRST | MIDDLE | A S O | AA | 25 DATE OF BIRTH: 3-22-60 | 26 PHONE BUSINESS: unknown

27 ADDRESS NUMBER | STREET: 1302 Delafield Place NW, DC | CITY | STATE | ZIP | 28 PHONE RESIDENCE: unknown

29 RACE	30 SEX	31 AGE	32 HGT	33 WGT	34 EYES	35 HAIR	36 HAIR LENGTH	37 HAIR STYLE	38 FACIAL HAIR	39 MARKS/SCARS	40 ARMED WITH
white	F	25	5 2	120	brn	brn	long	---	no	no vis.	no

41 HAT	42 COAT/JACKET	43 SHIRT	44 TROUSERS/SKIRT	45 SHOES	46 SOCIAL SECURITY NUMBER	47 POID
	flower print/	white pants/sandels			217 48 0957	

48 LAST | FIRST | MIDDLE | A S O | 49 DATE OF BIRTH | 50 PHONE BUSINESS

51 ADDRESS NUMBER | STREET | CITY | STATE | ZIP | 52 PHONE RESIDENCE

53 RACE	54 SEX	55 AGE	56 HGT	57 WGT	58 EYES	59 HAIR	60 HAIR LENGTH	61 HAIR STYLE	62 FACIAL HAIR	63 MARKS/SCARS	64 ARMED WITH

65 HAT	66 COAT/JACKET	67 SHIRT	68 TROUSERS/SKIRT	69 SHOES	70 SOCIAL SECURITY NUMBER	71 POID

72 VEHICLE ☐ INVOLVED IN CRIME ☐ KNOWN TO OPERATE | 73 YEAR | 74 MAKE | 75 MODEL | 76 BODY STYLE | 77 COLOR | 78 TAG NUMBER | 79 STATE | 80 IDENTIFYING FEATURES/VIN

81 ☐ IMPOUNDED ☐ STOLEN ☐ RECOVERED ☐ SEIZED | REMOVED TO | REMOVED BY | 82 NCIC ☐ TELETYPE ☐ RADIO LOOKOUT ☐ | 83 VALUE RECOVERED $

83 ARREST(S) DATE: 4-22-85 | 84 TIME: 1200 | 85 CHARGE(S): DEMONSTRATE W/O PERMIT | 86 COURT DATE: PENDING | 87 VALUE STOLEN $

9 ITEM	NARRATIVE (1) CONTINUATION OF ABOVE ITEMS. INDICATE ITEM NUMBER AT LEFT. INCLUDE ADDITIONAL WITNESSES AND SUSPECTS. (2) INDICATE HOW NOTIFIED OF INCIDENT. DESCRIBE DETAILS OF INCIDENT. (3) DESCRIBE PROPERTY AND ITS VALUE	90 STL	91 REC	92 PROP	93 VALU

On 4-22-85, above defendant along with other members of a group called "April Actions for Jobs, Justice and Peace" were demonstrating on the south sidewalk of 1600 Pennsylvania Ave.NW. The defendant and other members of the group sat in the driveway and obstructed and denied access to the West Executive Gate.

I heard U.S. Park Police Lt. M. Barrett, under the direction of Mr. R. Robbins-Solicitor/National Park Service, advise the defendant and the group that their permit was revoked and they would have to move or would be arrested. The defendant and the group were given this warning three times with a five minute period between each warning. After the third warning and waiting period, the defendant was arrested for "Demonstrating Without a Permit". The defendant was taken to the Anacostia Operations Facility, processed and released.

94 INVESTIGATOR NOTIFIED

STATUS ☐ OPEN ☐ SUSPENDED | CLOSED BY ☐ ARREST ☐ EXCEPTION ☐ UNFOUNDED | 96 DISPOSITION

97 REPORTING OFFICER: J. Materese | BADGE/ID: 0498 | DATE: 4-24-85 | 98 ASSISTING OFFICER: C. Covington | BADGE/ID: 142 | 99 SUPERVISOR | BADGE/ID | DAT

51a

NATIONAL PARK SERVICE

CRIMINAL INCIDENT R[illegible] ORD

U.S. PAR
PARK RANGE
JUVENI

3 ORGANIZATION CODE	3 SYSTEM AREA	4 LOCATION CODE	5 YEAR	CASE/INCIDENT NU
3960		2001	85	0150

6 LOCATION OF INCIDENT: 1600 Pennsylvania Ave. NW, DC

West Executive Gate

7 BEAT	8 WHEN (DATE OF INCIDENT)	MO	DAY	YR	9 24 HOUR TIME	HRS.	MIN.	10
121		04	22	85		12	05	

11 OFFENSE/INCIDENT CODE: 12 NATURE OF INCIDENT: Demonstrating Without a Permit 36CFR 50.19

13 WHEN RECEIVED: DATE 4-22-85 TIME 1205

COMPLAINANT / WITNESS / VICTIM

14 LAST	FIRST	MI	C V W	15 DATE OF BIRTH	16 PHONE BUSIN

17 ADDRESS NUMBER	STREET	CITY	STATE	ZIP	18 PHONE RESID

19 LAST	FIRST	MI	C V W	20 DATE OF BIRTH	21 PHONE BUSIN

22 ADDRESS NUMBER	STREET	CITY	STATE	ZIP	23 PHONE RESID

ARRESTED

24 LAST	FIRST	MIDDLE	A S O	25 DATE OF BIRTH	26 PHONE BUSINE
Sinai,	Julie	lynn		11-5-60	unknown

27 ADDRESS NUMBER	STREET	CITY	STATE	ZIP	28 PHONE RESID
1302	Delafield	Pl.NW, Washington, DC			unknown

29 RACE	30 SEX	31 AGE	32 HGT	33 WGT	34 EYES	35 HAIR	36 HAIR LENGTH	37 HAIR STYLE	38 FACIAL HAIR	39 MARKS/SCARS	40 ARMED WITH
white	F	24	5 6	150	brn	blk	shoulde	curl	no	no vis.	no

41 HAT	42 COAT/JACKET	43 SHIRT	44 TROUSERS/SKIRT	45 SHOES	46 SOCIAL SECURITY NUMBER	47 POID
		pink	white pants/white shoe		559 41 9418	

SUSPECT / OTHER

48 LAST	FIRST	MIDDLE	A S O	49 DATE OF BIRTH	50 PHONE BUSINES

51 ADDRESS NUMBER	STREET	CITY	STATE	ZIP	52 PHONE RESIDE

53 RACE	54 SEX	55 AGE	56 HGT	57 WGT	58 EYES	59 HAIR	60 HAIR LENGTH	61 HAIR STYLE	62 FACIAL HAIR	63 MARKS/SCARS	64 ARMED WITH

65 HAT	66 COAT/JACKET	67 SHIRT	68 TROUSERS/SKIRT	69 SHOES	70 SOCIAL SECURITY NUMBER	71 POID

72 VEHICLE ☐ INVOLVED IN CRIME ☐ KNOWN TO OPERATE | 73 YEAR | 74 MAKE | 75 MODEL | 76 BODY STYLE | 77 COLOR | 78 TAG NUMBER | 79 STATE | 80 IDENTIFYING FEATURES/VIN

☐ IMPOUNDED ☐ STOLEN ☐ RECOVERED ☐ SEIZED — REMOVED TO — 81 MOVED BY — 82 NCIC ☐ TELETYPE ☐ RADIO LOOKOUT ☐

83 ARREST(S) DATE	84 TIME	85 CHARGE(S)	86 COURT DATE	87 VALUE STOLEN $	88 VALUE RECOVERED $
4-22-85	1205	DEMONSTRATE W/O PERMIT	PENDING		

ITEM	NARRATIVE (1) CONTINUATION OF ABOVE ITEMS. INDICATE ITEM NUMBER AT LEFT. INCLUDE ADDITIONAL WITNESSES AND SUSPECTS. (2) INDICATE HOW NOTIFIED OF INCIDENT. DESCRIBE DETAILS OF INCIDENT. (3) DESCRIBE PROPERTY AND ITS VALUE	90 STL	91 REC	92 PROP	93 VAL
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	I heard U.S. Park Police Lt. N. Barrett, under the direction of Mr. R. Robbins-Solicitor/National Park Service, advise the defendant and the group that their permit was revoked and they would have to move or would be arrested. The defendant and group were given this warning three times with a five minute period between each warning. After the third warning and waiting period, the defendant was arrested for "Demonstrating Without a Permit". The defendant was taken to the Anacostia Operations Facility, processed and released on citation.				

52a

NATIONAL PARK SERVICE

CRIMINAL INCIDENT RECORD

PARK RANGER / JUVENILE

2 Organization Code	3 System Area	4 Location Code	5 Year	Case/Incident Number
3 9 6 0	1600 Pennsylvania Ave. NW	1 0 0 1	8 5	0 1 5 0

6 Location of Incident	7 Beat	8 When Incident Occurred	Mo	Day	Yr	Hour Time	Hrs
West Executive Gate	021		0 4	2 2	8 5		1 2 0 7

11 Offense/Incident Code	12 Nature of Incident	13 When Received Date	Time
	Demonstrating Without A Permit 36CFR50.19	4-22-85	1207

COMPLAINANT / WITNESS / VICTIM

14 Last / First / MI / C V W / 15 Date of Birth / 16 Phone Business

17 Address Number / Street / City / State / Zip / 18 Phone Residence

19 Last / First / MI / C V W / 20 Date of Birth / 21 Phone Business

22 Address Number / Street / City / State / Zip / 23 Phone Residence

ARRESTED / SUSPECT / OTHER

24 Last / First / Middle	A S O	25 Date of Birth	26 Phone Business
Spener, Richard David	A	6-11-61	unknown

27 Address Number / Street / City / State / Zip	28 Phone Residence
2504 Cliffbourne Pl. NW, DC	unknown

29 Race	30 Sex	31 Age	32 Hgt	33 Wgt	34 Eyes	35 Hair	36 Hair Length	37 Hair Style	38 Facial Hair	39 Marks/Scars	40 Armed With
white	male	23	5 9	155	blue	brown	medium	curly	no	no vis.	

41 Hat	42 Coat/Jacket	43 Shirt	44 Trousers/Skirt	45 Shoes	46 Social Security Number	47 PDID
		checked/	tan pants/	blue	499 74 8639	

48 Last / First / Middle / A S O / 49 Date of Birth / 50 Phone Business

51 Address Number / Street / City / State / Zip / 52 Phone Residence

53 Race / 54 Sex / 55 Age / 56 Hgt / 57 Wgt / 58 Eyes / 59 Hair / 60 Hair Length / 61 Hair Style / 62 Facial Hair / 63 Marks/Scars / 64 Armed With

65 Hat / 66 Coat/Jacket / 67 Shirt / 68 Trousers/Skirt / 69 Shoes / 70 Social Security Number / 71 PDID

72 Vehicle ☐ Involved in Crime ☐ Known to Operate / 73 Year / 74 Make / 75 Model / 76 Body Style / 77 Color / 78 Tag Number / 79 State / 80 Identifying Features

81 ☐ Impounded ☐ Stolen ☐ Recovered ☐ Seized / Removed To / Removed By / NCIC / Teletype / Radio Lookout

83 Arrest(s) Date	84 Time	85 Charge(s)	86 Court Date	87 Value Stolen	88 Value Recovered
4-22-85	1207 hrs	Demonstrate without Permit	pending	$	$

ITEM — NARRATIVE: (1) CONTINUATION OF ABOVE ITEMS, INDICATE ITEM NUMBER AT LEFT, INCLUDE ADDITIONAL WITNESSES AND SUSPECTS. (2) INDICATE HOW NOTIFIED OF INCIDENT, DESCRIBE DETAILS OF INCIDENT. (3) DESCRIBE PROPERTY AND ITS VALUE. — STL / REC / PROP

On 4-22-85, above def. and other members of a group called "April Actions for Jobs, Justice and Peace" were demonstrating on the south sidewalk of 1600 Pa. Ave. NW. The Def. and other group members sat in the driveway and obstructed and denied access to the West Executive gate.

I heard U.S.P.P. Lt. M. Barrett, under the direction of Mr. Robbins-Solicitor/National Park Service, advise the def. and the group that their permit was revoked and they would have to move or they would be arrested. The def. and group were given this warning three times with a five minute period between each warning. After the third warning and waiting period, the def. was arrested for "Demonstrating without a Permit". The def. was taken to the Anacostia Operations Facility, processed and released on citation.

Investigator Notified

Status ☐ Open ☐ Suspended ☐ Closed by ☐ Arrest ☐ Exception ☐ Unfounded / Disposition

Reporting Officer	Badge ID	Date	Assisting Officer	Badge ID	Supervisor	Badge ID
G Materese	0 7 3	4-24-85	Covington	463		

53a